

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
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STATES COURT OF APPEALS

919

IN THE United States Court of Appeals  
for the District of Columbia Circuit  
**UNITED STATES COURT OF APPEALS**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED SEP 3 1969

No. 23,160

*Nathan J. Paulson*  
CLERK

FOX-GREENWALD SHEET METAL CO., INC.

v.

MARKOWITZ BROTHERS, INC.  
CONTINENTAL CASUALTY CO.

and

BLAKE CONSTRUCTION CO., INC.

Appellant,

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

APPENDIX





## TABLE OF CONTENTS

Docket Entries .....	1
Petition by Continental Casualty Co. for Leave to Pay Judgement into Registry of Court and for Other Relief .....	5
Order Granting Leave to Continental Casualty Company to Pay Amount of Judgment into the Registry of this Court .....	9
Motion by Blake Construction Co., Inc. for Leave to Intervene and to File a Petition Asserting Priority of Assignment to Funds Represented by Judgment .....	10
Motion by Fred C. Sacks for Leave to Intervene and to File a Claim Asserting Priority of an Attorney's Lien Against the Funds Represented by Judgment .....	12
Motion of United States of America for Leave to Intervene .....	14
Order, dated 8/21/68, granting Leave for Blake Construction Co., Inc. to Intervene and to File a Petition Asserting Priority of Assignment to Funds Represented by Judgment .....	16
Petition by Blake Construction Co., Inc. for Intervention and Assertion of Priority of its Assignment to Funds Represented by Judgment .....	17
Order, dated 9/12/68, granting Leave to Intervene and File Claim to Fred C. Sacks .....	21
Intervening Claim of Fred C. Sacks .....	22
Order, dated 11/14/68, granting Leave for the United States of America to Intervene .....	24
Complaint in Intervention of the United States of America .....	25
Order, dated 1/6/69, to pay Fred C. Sacks \$28,451.17 from the Funds in the Registry of the Court, said sum representing the Amount of his Attorney's Lien .....	29
Transcript of Proceedings	
Witness-Stanley S. Bender (on direct) .....	30, 63
Cross .....	46
Memorandum Opinion of the United States District Judge Joseph P. McGarraghy, dated 2/28/69 .....	68
Judgment of 4/1/69, in Favor of Intervenor, United States of America .....	72
Notice of Appeal, filed 4/8/69 .....	73
<b>BLAKE'S EXHIBITS</b>	
No. 1 Collateral Assignment of Proceeds of Building Contract (8/27/63) .....	74
No. 2 Promissory Note, with Endorsement and Guarantee of Payment (8/27/63) .....	76
No. 3 Minutes of Meeting of Board of Directors of Max Greenwald & Sons, Inc. (8/16/63) .....	77

No. 4	Minutes of Meeting of Board of Directors . . . . .	78
No. 5a	Front of 2 checks, each drawn on American Security & Trust Company by Blake Construction Company, the first made out to Fox-Greenwald, Inc. for \$20 thousand, (8/15/63), and the second made out to Fox-Greenwald, Inc. for \$30 thousand (8/27/63)-both signed by Stanley S. Bender .	79
No. 5b	Backsides of two checks mentioned in 5a . . . . .	80
No. 6	Minutes of Meeting of Board of Directors of Fox-Greenwald Sheet Metal Co., Inc. (8/16/63) . . . . .	81
No. 7	Letter, dated 11/1/63, from Stanley S. Bender to Markowitz Brothers, Inc. . . . .	82
No. 8	Letter, dated 8/28/63, from Max Greenwald to Markowitz Brothers, Inc. . . . .	83
UNITED STATES GOVERNMENT EXHIBITS		
No. 2	Stipulation, dated 2/12/69, between Fox-Greenwald and United States of America . . . . .	84

## United States District Court for the District of Columbia

FOIA-61269000000000

vs. BLAKE CONSTRUCTION CO., INC. C. A. No. 1693-64 Supplemental Page No. 3

DATE		PROCEEDINGS	FEES	TOTAL
1958				
July	9	Amended bill of costs verified by plaintiff's attorney. filed		20
July	9	Costs taxed on amended bill of costs in favor of plaintiff in sum of \$65.50. (N) filed		20
July	17	Bill of costs as taxed by Clerk, U.S.C.A. in amount of \$48.63 filed		29
July	17	Certified copy of judgment of U.S.C.A. affirming judgment of U.S.D.C.; copy of opinion attached filed		36
July	30	Petition of deft. #2 for leave to pay judgment into Registry of Court and other relief; c/m 7-30; exhibits A thru F; M.C. filed		41
Aug	1	Motion of Blake Construction Co., Inc. for leave to intervene; c/m 8-1; P&A; exhibits 1 and 2; M.C.; appearance of Danzansky and Dickey; deposit by Danzansky \$5.00. filed		42
Aug	20	Order granting leave to Continental Casualty Company to pay \$114,232.49 into the Registry of the Court and discharging said deft. upon deposit. (N) Hart, J. filed		43
Aug	20	Deposit by Continental Casualty Co. of sum \$114,232.49 into Registry of Court pursuant to order of Aug. 20. filed		
Aug	21	Order granting leave to intervene and to file a Petition Asserting Priority of Assignment of Funds Represented by Judgment by Blake Construction Co., Inc. (N) Hart, J. filed		34
Aug	22	Petition of intervenor Blake Construction Co.; appearance of Danzansky and Dickey. filed		35
Sep	3	Motion by Fred C. Sacks to intervene and to file a claim; c/m 9-3; P&A; exhibit. Deposit by Sacks \$5.00 filed		44



Sep 12	Order granting Fred C. Sacks leave to intervene to file a claim; micro. 9-18.	(N)	Robinson, J.	37
Sep 18	Intervening claim by Fred C. Sacks; c/m 8/29/68.		filed	38
Oct 21	Motion of Blake Construction Co Inc to set intervening claims for hearing and disposition; C/M 10-18, MC		filed	39
Oct 22	Motion of pltf to advance for hearing; C/M 10-21 MC		filed	40
Oct 30	Transmittal sheet from USCA returning original fllo.		filed	
Nov 1	Motion of United States of America for leave to intervene; P&A; exhibit; c/m 11-1; M.C.; appearance of Mitchell Rogovin, Fred C. B. Uggat and Stephen V. Wilton, and David G. Brown.		filed	41
Nov 8	Motion of pltf. to advance for hearing and motion of Blake Con- struction Co., Inc. to set claims for hearing, heard and hearing set for January 6, 1969. (AC/N) (Rep: Marie Taylor)		McGarraghy, J.	
Nov 14	Order granting leave to United States of America to intervene. (N) Micro 11-18-69		McGuire, J.	42
Nov 18	Receipt for pltf's exhibits.		filed	
Nov 22	Complaint of intervenor.		filed	
Nov 27	Interrogatories of intervenor USA to intervenor Blake Construction Co., Inc; c/m 11-27.		filed	43
1969				
Jan 6	Order directing the clerk to pay from the Registry of Court to Fred- C. Sacks the sum of \$28,451.17 counsel fees and \$427.80 re- presenting advanced costs, forthwith. Mc Garraghy, J.			44
Jan 6	Paid to Fred C. Sacks, attorney, \$28,878.97 by Registry Check #5192 pursuant to order of court filed 1-6-69.			
Jan 6	Receipt from Fred C. Sacks, attorney, for Registry Check #5192 payable to Fred C. Sacks, attorney.		filed	45
1969				
Jan 14	Answers of intervenor Blake to interrogatories c/m 1-11; exhibits 1 thru 7 (except 6).		filed	

Feb 27	request by cert. #1 for admissions; c/m 1-30; exhibits A thru L. filed	27
Feb 10	Statement of Blake Construction Co., Inc., Intervenor in response to request for admissions; c/m 2/7/69. filed.	28
Feb. 17	Claims of Intervenor, Blake and U.S.A., heard in part and continued to Feb. 24, 1969 at 10:00 A.M.; Memos. of said Intervenor to be filed by Feb. 24, 1969. (Rep. Marie Taylor) McGarraghy, J.	29
Feb 24	Hearing on Claims of Intervenor Blake and U.S.A. resumed; concluded and taken under advisement. (Rep: Marie Taylor) McGarraghy, J.	30
Feb 27	Supplemental memorandum of U.S.A. re validity of the assignment by Blake Construction Company, Inc., c/m 2/25/69. filed.	31
Feb 28	Memorandum of Intervenor, U.S.A. respecting the validity of the assignment asserted by Intervenor, Blake Construction Company, Inc. filed	32
Feb 28	Brief of Intervenor, Blake Construction Co., Inc. filed	33
Feb 28	Memorandum granting fund in registry of court to United States of America. (Order to be presented) (N) McGarraghy, J.	34
Apr 1	Judgment for United States of America vs. Fox-Greenwald Sheet Metal Company, Inc. in amount of \$112,189.45, plus interest; USA is entitled to priority over claim of Blake Construction Co., Inc. to fund in Registry of Court; statute of limitations bars said claim of Blake Construction Co., Inc.; Clerk of Court to pay USA \$85,353.52 from Registry 10 days after entry of this Judgment, which shall be applied on outstanding tax liabilities adjudged against Fox-Greenwald Metal Co., Inc. (N) McGarraghy, J.	35
Apr 8	Notice of appeal of Blake Construction Company, Inc. from Order of 4/1/69; deposit by Miller \$5.00. (copies mailed to Fred C. Sacks, Mark P. Friedlander and the Attorney General. filed.	36
Apr 10	Cost Bond on Appeal of Blake-Construction Company in the amount of \$250.00 with Aetna Casualty & Surety Company; Approved. (FIAT) McGuire, J..	37



Apr	10	Supersedes Bond of Blake-Construction Company in amount of \$6,732.00 with Aetna Casualty & Surety Company; Approved. (FIAT) McGuire, J.	
May	6	Exhibits 1-4, 5a, 5b, 6, 7, 8, by pltf. filed	55
May	15	Motion of intervenor Blake Construction Co., Inc. to extend time to transmit record on appeal; P&A; c/m 5/15/69. filed	56
May	16	Consent Order extending time for transmission of the record to the Court of Appeals until June 18, 1969. 371/N (N( McGuire, J.	57
May	21	Transcript of proceedings (2/17/69) (Rep. Marie S. Taylor); (Court's copy) filed	58

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FOX-GREENWALD SHEET METAL CO., INC. :  
a corporation :

Plaintiff :

vs. :

MARKOWITZ BROTHERS, INC. :  
a corporation :

Civil Action No. 1693-64

and :

CONTINENTAL CASUALTY CO., :

Defendants :

**FILED**  
JUL 30 1968  
ROBERT M. SIEMMIS, CLERK

PETITION BY CONTINENTAL CASUALTY CO. FOR LEAVE TO  
PAY JUDGMENT INTO REGISTRY OF COURT AND FOR OTHER RELIEF

Defendant Continental Casualty Company, by its attorneys, petitions this Court for permission to pay amount of the judgment entered herein plus interest and costs into the registry of this Court and upon such payment for an order exonerating it from further liability in connection with the matter and states its reasons therefor as follows:

1. On or about December 20, 1966, plaintiff, Fox-Greenwald Sheet Metal Co., Inc., obtained a jury verdict in this action for the sum of \$103,458.81 against defendants Markowitz Brothers, Inc. and Continental Casualty Company and judgment was duly entered thereon against the defendants.
2. Thereafter, defendants Markowitz and Continental appealed such judgment, resulting in the affirmance thereof by the United States Court of Appeals for the District of Columbia Circuit on June 25, 1968.

3. The total accrued interest due from the date of the entry of such judgment, December 20, 1966, to the date of the filing of this petition is the sum of \$10,001.03, plus costs in the amount of \$ 427.80.

4. Your petitioners have received from the following creditors of Fox-Greenwald Sheet Metal Co., Inc., notices making claim to the judgment proceeds:

a) On or about August 27, 1963, Blake Construction Co., Inc., obtained an assignment from Fox-Greenwald Sheet Metal Co., Inc., to secure a loan to plaintiff in the sum of \$50,000.00, plus interest at the rate of six per cent per annum and has asserted a claim against the judgment proceeds by notice thereof. Copy of such assignment is annexed hereto and made a part hereof marked Exhibit A.

b) On or about May 5, 1964, The United States of America, Treasury Department, Internal Revenue Service, after filing its tax liens against plaintiff, served a notice of levy upon defendant Continental Casualty Company, claiming at that time, including interest and penalties, the sum of \$113,986.05. Copy of notice of levy is attached hereto and made a part hereof marked Exhibit B.

c) In May 1965, Omark Industries, by and through its attorney, Milton Dunn, had an attachment on judgment against plaintiff served on Continental Casualty Company demanding the sum of \$1,837.93 plus interest and costs, by reason of a judgment against plaintiff.

d) On March 3, 1966, J. B. Kendall, by and through its attorney, Milton Dunn, served upon Continental Casualty Company an attachment on judgment against plaintiff for the sum of \$151.41 plus interest and costs.

e) On or about December 21, 1966, Young & Simon, Inc. and New Amsterdam Casualty Company, acting through their attorney, Newton Frohlick, served Continental Casualty Company, with an attachment on judgment against



plaintiff for sums of \$10,451.98 and \$6,286.19 respectively, with interest from January 26, 1965 plus costs. Copies of such attachments on judgments are annexed hereto and made a part hereof marked Exhibits C and D.

f) Fred C. Sacks, attorney for plaintiff in this cause, is asserting and herewith claiming an attorney's lien in the amount of 25 per cent of the judgment.

g) On July 5, 1968, Sheet Metal Workers Local Union #102, Apprentices, Pension and Welfare Funds, by and through its attorney, William R. Voltz, served Continental Casualty Company with a writ of attachment on a judgment claiming that it is due from plaintiff the sum of \$5,227.42 with costs in the sum of \$18.00 and interest from May 2, 1966 at the rate of six per cent. Copy of such writ is annexed hereto and made a part hereof marked Exhibit E.

5. As a result of the foregoing claims to the proceeds of the judgment entered herein, Continental Casualty Company is faced with a multiplicity of suits, and with multiple undertermined liabilities, excessive, unnecessary, and complex litigation on a single obligation.

6. Continental Casualty Company further states that the above mentioned creditors, as well as all other creditors of plaintiff, Fox-Greenwald Sheet Metal Co., Inc., who have or may claim a lien or right to the proceeds of the said judgment should be required to intervene herein and to assert their claims to the judgment proceeds to the end that multiple liabilities and multiplicity of suits respecting the judgment proceeds be avoided by Continental Casualty Company.

7. Finally, Continental alleges that it is entitled, upon payment of the amount of the judgment plus interest and costs into the registry of this Court, fully and completely to be relieved, discharged and exonerated of and from any and all further liability to persons making claim to the proceeds of the judgment entered herein.


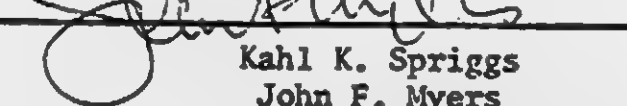
8. All persons referred to in paragraph 3 of this petition have been notified of the filing of this petition. See Certificate of Service hereafter.

WHEREFORE, the premises considered, Continental Casualty Company requests relief as follows:

1. That all creditors of Fox-Greenwald Sheet Metal Co., Inc. making claim to the proceeds of the judgment entered herein be required to appear or to intervene herein and to assert their lawful interest in and to the fund represented by such judgment in this proceeding.

2. That Continental Casualty Company upon payment of the amount of such judgment plus interest, of, to wit, \$ 10,000.03 and costs of \$ 427.80 into the registry of this Court be relieved, discharged and exonerated of and from any and all further liability respecting the judgment against it in this cause and that it be discharged of any and all liability to the creditors of Fox-Greenwald Sheet Metal Co., Inc. on account of the judgment entered herein against Continental Casualty Company.

3. And for such other and further relief as to the Court may seem just and proper or as the case may require.

Kahl K. Spriggs  
John F. Myers  
Attorneys for Defendant Continental  
Casualty Company  
504 Southern Building  
Washington, D. C. 20005  
Tel: NA 8-1501

[Certificate of Service Omitted in Printing]

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[Caption Omitted in Printing]

ORDER GRANTING LEAVE TO CONTINENTAL CASUALTY COMPANY  
TO PAY AMOUNT OF JUDGMENT INTO THE REGISTRY OF THIS COURT

Upon consideration of the petition by Continental Casualty Company for leave to pay the amount of the judgment in the above entitled cause into the Registry of this Court, it is by the Court this 20<sup>th</sup> day of August, 1968

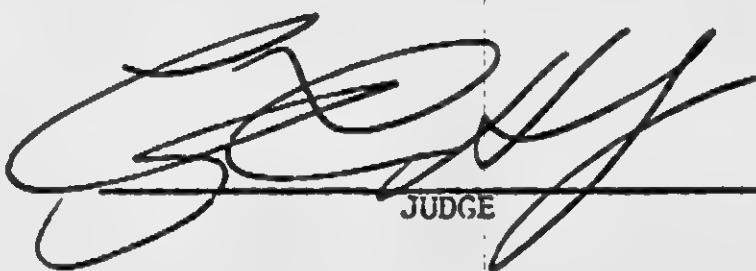
ORDERED, that the relief prayed for in such petition, be, and it hereby is, granted; and it is

FURTHER ORDERED, that upon payment forthwith by Continental Casualty Company of the amount of the judgment against it, to wit, the sum of \$103,458.91, together with accrued interest thereon from December 20, 1966 to August 20, 1968 besides costs of \$427.80, or a total of \$114,232.49, into the Registry of this Court, Continental Casualty Company shall stand and be discharged and exonerated from any and all other and further liability with respect to the judgment against it in this cause.

**FILED**

AUG 20 1968

ROBERT M. STEARNS, Clerk

  
JUDGE

[Certificate of Service Omitted in Printing]

**E I L E D**

[Caption Omitted in Printing]

AUG 1 1968

MOTION BY BLAKE CONSTRUCTION CO., INC.  
FOR LEAVE TO INTERVENE AND TO FILE A  
PETITION ASSERTING PRIORITY OF ASSIGN-  
MENT TO FUNDS REPRESENTED BY JUDGMENT.

ROBERT M. STEARNS, Clerk

Now comes the Movant, BLAKE CONSTRUCTION CO., INC., by its attorneys DANZANSKY & DICKEY and moves the court for leave to intervene and to file a petition asserting priority of assignment to funds represented by judgment, and for grounds for such motion says:

1. On or about July 30, 1968, the defendant, CONTINENTAL CASUALTY CO., filed a petition for leave to pay the amount of a judgment heretofore entered in the above-entitled cause into the registry of the court and to require creditors of the plaintiff, FOX-GREENWALD SHEET METAL CO., INC., to intervene and assert their claims to the proceeds of such judgment. This petition by the defendant, CONTINENTAL CASUALTY CO., resulted from the affirmance on appeal by the United States Court of Appeals for the District of Columbia Circuit on June 25, 1968, of a judgment previously entered in this cause on December 20, 1966, in favor of the plaintiff and against the defendants in the amount of \$103,458.81.

2. On or about August 27, 1963, the Movant, BLAKE CONSTRUCTION CO., INC., was given an assignment by the plaintiff, FOX-GREENWALD SHEET METAL CO., INC., to secure a loan from BLAKE CONSTRUCTION CO., INC. to the plaintiff in the amount of \$50,000 plus interest at the rate of 6% per annum, evidenced by a promissory note. Such assignment covered all moneys due or to become due to FOX-GREENWALD SHEET METAL CO., INC. from MARKOWITZ BROTHERS, INC. as a result of the performance of a construction subcontract

on the National Bureau of Standards building in Gaithersburg, Maryland. The Movant, BLAKE CONSTRUCTION CO., INC., was the prime contractor on the National Bureau of Standards job; MARKOWITZ BROTHERS, INC. was its subcontractor for the mechanical work to be performed on such project; and FOX-GREENWALD SHEET METAL CO., INC. was the subcontractor of MARKOWITZ BROTHERS, INC. for the performance of sheet metal work on such job.

3. FOX-GREENWALD SHEET METAL CO., INC. is indebted to the plaintiff on the said \$50,000 note together with interest at the rate of 6% per annum since August 27, 1963, no payments having been made on the said obligation which is secured by the assignment above-described. A copy of the FOX-GREENWALD SHEET METAL CO., INC. collateral assignment of proceeds of building contract, together with related minutes of the Board of Directors of the corporations involved, copies of the BLAKE CONSTRUCTION CO., INC. checks totaling \$50,000, and of the promissory note and endorsement and guarantee of payment are attached hereto as BLAKE Exhibit 1 and are incorporated herein by reference.

4. As a result of the above-described assignment of proceeds of a building contract on August 27, 1963, BLAKE CONSTRUCTION CO., INC. is entitled to assert a prior claim to the proceeds of the judgment heretofore entered and affirmed in the above-entitled cause inasmuch as said judgment represents moneys adjudicated to be due and owing from MARKOWITZ BROTHERS, INC. to FOX-GREENWALD SHEET METAL CO., INC. for the performance of work by the plaintiff on the National Bureau of Standards building, which proceeds are the subject of the collateral assignment from FOX-GREENWALD SHEET

METAL CO., INC. to BLAKE CONSTRUCTION CO., INC. which occurred prior in time and takes precedence over the claims of all other creditors of FOX-GREENWALD SHEET METAL CO., INC. as described in the petition by the defendant, CONTINENTAL CASUALTY CO.

5. A copy of the proposed petition by BLAKE CONSTRUCTION CO., INC. asserting the priority of its assignment to the funds represented by the judgment is attached hereto as BLAKE Exhibit 2 and is incorporated herein by reference.

WHEREFORE, the Movant, BLAKE CONSTRUCTION CO., INC., respectfully requests an order for leave to intervene and to file a petition asserting priority of assignment to funds represented by judgment.

DANZANSKY & DICKEY

By Marshall E. Miller  
Marshall E. Miller

Robert D. Roadman  
Robert D. Roadman  
1120 Connecticut Ave., N. W.  
Washington, D. C. (333-8700)

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

MOTION BY FRED C. SACKS FOR LEAVE TO  
INTERVENE AND TO FILE A CLAIM ASSERTING  
PRIORITY OF AN ATTORNEY'S LIEN AGAINST  
THE FUNDS REPRESENTED BY JUDGMENT

FILED

SEP - 3 1968

ROBERT M. SILLARS, CLERK

Now comes the Movant, Fred C. Sacks, and moves the Court for leave to intervene and file a claim asserting priority of an attorney's lien to funds represented by judgment and for grounds of said motion says:

1. On August 16, 1968, an Order was issued permitting the defendant, Continental Casualty Co., to pay into the Registry of the Court the sum of \$114,232.49 and to require creditors of the plaintiff, Fox-Greenwald Sheet Metal Co., Inc. to intervene and assert their claim to the proceeds of such judgment.

2. The Movant was retained by the said Fox-Greenwald Sheet Metal Co., Inc. to represent them in a suit between the plaintiff and the defendants wherein a contingency fee arrangement was made in which the movant was to receive for legal services twenty five (25%) percent of any monies recovered for the benefit of the said plaintiff, Fox-Greenwald Sheet Metal Co., Inc.

3. An action was thereafter filed in 1964, tried in December of 1966 resulting in a judgment in favor of the plaintiff, which judgment was appealed to the United States Circuit Court of Appeals for the District of Columbia Circuit, said judgment being affirmed on June 25, 1968.

4. Defendant, Continental Casualty Co., by reason of existing claims made against it by creditors of the plaintiff, Fox-Greenwald Sheet Metal Co., Inc., sought leave to deposit the amount of the judgment together with interest and costs which was granted by this Court and the movant seeks leave to file a claim asserting the attorney's lien to which he is



entitled against the funds which were created through his efforts on behalf of the plaintiff.

5. A copy of the proposed claim setting forth the existing lien against the funds now on deposit with the Registry of the Court is attached hereto and made a part hereof.

WHEREFORE, the movant, Fred C. Sacks, respectfully requests and Order for leave to intervene and to file a claim asserting the existence of an attorney's lien against the funds represented by the judgment.

*Fred C. Sacks*

FRED C. SACKS,  
Attorney for Plaintiff & Movant  
856 Executive Building  
Washington, D.C. 20005  
659-1200

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

MOTION OF UNITED STATES OF AMERICA  
FOR LEAVE TO INTERVENE

FILED

NOV 1 1968

BERNARD J. DIENING, CLERK

The United States of America, by its attorneys, moves the Court for leave to intervene and file a claim asserting federal tax liens to funds held by the Court in the above-entitled action and alleges:

I

In December, 1966, Fox-Greenwald Sheet Metal Co., Inc., obtained a judgment against Markowitz Brothers, Inc., and Continental Casualty Company in the United States District Court for the District of Columbia, which judgment was appealed to the United States Court of



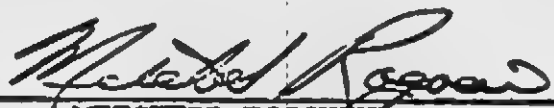
Appeals for the District of Columbia Circuit and affirmed on June 25, 1968.


## II

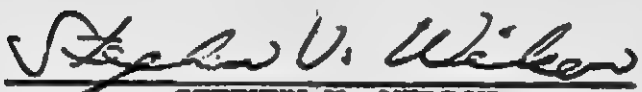
Defendant Continental Casualty Company, by reason of existing claims made against it by creditors of plaintiff Fox-Greenwald Sheet Metal Co., Inc., petitioned the District Court for leave to pay the amount of the judgment, together with interest and costs, to wit, \$114,232.49, into the registry of this Court, and to require all creditors of plaintiff to intervene and assert their interest in the fund, which petition was granted by this Court.

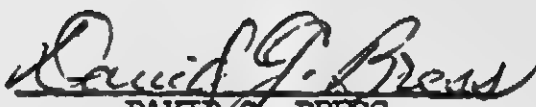
## III

The United States has an interest in the fund described in paragraph II by reason of federal tax liens outstanding against plaintiff Fox-Greenwald Sheet Metal Co., Inc., and as more fully appears from the complaint in intervention attached hereto.

  
MITCHELL ROGOVIN  
Assistant Attorney General  
Tax Division

  
FRED B. UGAST  
Chief, General Litigation Section

  
STEPHEN V. WILSON  
Attorney, General Litigation Section

  
DAVID G. BRESS  
United States Attorney  
Of counsel

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**FILED**  
AUG 21 1968  
ROBERT M. STEARNS, Clerk

FOX-GREENWALD SHEET METAL CO., INC.,  
Plaintiff,

v.

MARKOWITZ BROTHERS, INC.

and

CONTINENTAL CASUALTY CO.,

Defendants.

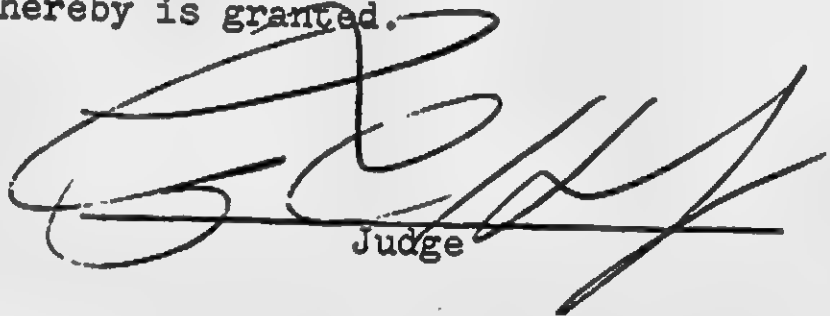
Civil Action No.

1693-64

ORDER

Upon consideration of the Motion of BLAKE CONSTRUCTION CO., INC. for Leave to Intervene and to File a Petition Asserting Priority of Assignment to Funds Represented by Judgment and the Memorandum of Points and Authorities in support thereof filed in the above-entitled cause on August 1, 1968, it is by the Court, this 21<sup>st</sup> day of August, 1968,

ADJUDGED, ORDERED AND DECREED that the Motion by BLAKE CONSTRUCTION CO., INC. for Leave to Intervene and to File a Petition Asserting Priority of Assignment to Funds Represented by Judgment be and the same hereby is granted.

  
Judge

[Certificate of Service Omitted in Printing]

**FILED**

AUG 22 1968

PETITION BY BLAKE CONSTRUCTION CO., INC.  
FOR INTERVENTION AND ASSERTION OF PRIORITY  
OF ITS ASSIGNMENT TO FUNDS REPRESENTED BY JUDGMENT

ROBERT M. STEARNS, CLERK

Now comes the petitioner, BLAKE CONSTRUCTION CO., INC., by its attorneys DANZANSKY & DICKEY, and by leave of court first had and obtained, files its petition to intervene in the above-entitled cause for the purpose of asserting the priority of an assignment to funds represented by the judgment heretofore entered in this cause and for grounds therefor alleges:

1. Petitioner BLAKE CONSTRUCTION CO., INC. is a corporation duly organized under the laws of the State of Delaware and has qualified to do business in the District of Columbia and maintains its principal offices and place of business in the District of Columbia.

2. Prior to August 27, 1963, the petitioner, BLAKE CONSTRUCTION CO., INC., was the prime contractor under a construction contract with the United States of America acting by and through the General Services Administration for the construction of the National Bureau of Standards buildings in Gaithersburg, Maryland. The defendant, MARKOWITZ BROTHERS, INC., was the mechanical subcontractor of BLAKE CONSTRUCTION CO., INC. for the performance of the mechanical work required under such construction contract. The plaintiff, FOX-GREENWALD SHEET METAL CO., INC., was the subcontractor of MARKOWITZ BROTHERS, INC. for the performance of the sheet metal work required on such job.

3. On or about August 27, 1963, the petitioner, BLAKE CONSTRUCTION CO., INC., loaned to the plaintiff, FOX-GREENWALD SHEET METAL CO., INC., the sum of \$50,000 required by the latter for the performance of its work on the job in question. Such loan of \$50,000 was evidenced by a promissory note providing for the payment of interest thereon at the rate of 6% per annum. On the same date the plaintiff, FOX-GREENWALD SHEET METAL CO., INC., executed a Collateral Assignment of Proceeds of Building Contract to BLAKE CONSTRUCTION CO., INC. Such Assignment assigned to BLAKE CONSTRUCTION CO., INC. all of the money then due or to become due under the construction contract between MARKOWITZ BROTHERS, INC. and FOX-GREENWALD SHEET METAL CO., INC. Copies of the BLAKE CONSTRUCTION CO., INC. checks totaling \$50,000, of the promissory note and endorsement and guarantee of payment, of the Assignment of Proceeds of Building Contract together with related minutes of the Board of Directors of the various corporations involved, are attached hereto as Exhibit 1 and are incorporated herein by reference.

4. In 1964, plaintiff, FOX-GREENWALD SHEET METAL CO., INC., filed suit against the defendants, MARKOWITZ BROTHERS, INC. and CONTINENTAL CASUALTY CO., for moneys allegedly due to the plaintiff for sheet metal work performed by it on the National Bureau of Standards buildings pursuant to its construction subcontract with MARKOWITZ BROTHERS, INC. and the surety bond furnished for such work by CONTINENTAL CASUALTY CO. On or about December 20, 1966, following a

jury trial in the above-entitled cause, a judgment was entered in favor of the plaintiff, FOX-GREENWALD SHEET METAL CO., INC., against the defendants, MARKOWITZ BROTHERS, INC. and CONTINENTAL CASUALTY CO., in the amount of \$103,458.81. Subsequent thereto the defendants filed an appeal in the United States Court of Appeals for the District of Columbia Circuit, which, on June 25, 1968, affirmed the judgment previously entered in favor of the plaintiff in this cause.

5. On or about July 30, 1968, the defendant, CONTINENTAL CASUALTY CO., filed a petition for leave to pay the amount of such judgment together with interest, into the registry of the court and to require creditors of the plaintiff, FOX-GREENWALD SHEET METAL CO., INC., to intervene in this cause and to assert their claims to the proceeds of such judgment.

6. FOX-GREENWALD SHEET METAL CO., INC., is indebted to the petitioner, BLAKE CONSTRUCTION CO., INC., on the above described \$50,000 note together with interest at the rate of 6% per annum since August 27, 1963, no payments having been made on said obligation which is secured by the Collateral Assignment of Proceeds of Building Contract above referred to.

7. As a result of the above-described Collateral Assignment of Proceeds of Building Contract executed by FOX-GREENWALD SHEET METAL CO., INC. on August 27, 1963, petitioner BLAKE CONSTRUCTION CO., INC. is entitled to

assert a prior claim to the proceeds of the judgment heretofore entered and affirmed in the above-entitled cause, inasmuch as said judgment represents moneys adjudicated to be due and owing to plaintiff, FOX-GREENWALD SHEET METAL CO., INC., from defendants, MARKOWITZ BROTHERS, INC. and CONTINENTAL CASUALTY CO., for the performance of work by the plaintiff on the National Bureau of Standards buildings, which proceeds of judgment are the subject of a valid prior assignment from plaintiff, FOX-GREENWALD SHEET METAL CO., INC., to petitioner BLAKE CONSTRUCTION CO., INC., which assignment occurred prior in time and takes precedence over the claims of all other creditors of FOX-GREENWALD SHEET METAL CO., INC.

WHEREFORE, the petitioner, BLAKE CONSTRUCTION CO., INC., prays for the entry of an order determining it is entitled to intervene and establish a prior right to the proceeds of the judgment paid into the registry of this court in the sum of \$50,000 together with interest at the rate of 6% per annum from August 27, 1963, and for such other and further relief as justice may require.

DANZANSKY & DICKEY

By Marshall E. Miller  
Marshall E. Miller

Robert D. Roadman  
Robert D. Roadman  
1120 Connecticut Ave., N. W.  
Washington, D. C. (333-8700)

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED  
SEP 12 1968  
ROBERT M. STEARNS, Clerk

FOX-GREENWALD SHEET METAL  
Co., INC.

Plaintiff

vs.

Civil Action No. 1693-64

MARKOWITZ BROTHERS, INC.

and

CONTINENTAL CASUALTY CO.,

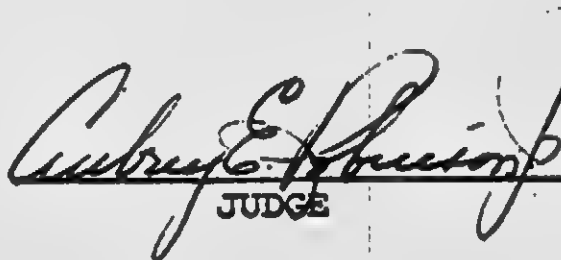
Defendants

ORDER

GRANTING LEAVE TO INTERVENE AND FILE CLAIM

Upon consideration of Motion by Fred C. Sacks for leave to intervene and file a claim in the above entitled cause, it is by the Court this 12<sup>th</sup> day of September, 1968,

ORDERED, that leave be granted for filing of intervening claim under the provisions of Rule 24, Federal Rules of Civil Procedure.

  
JUDGE



**E I L E D**

22

[Caption Omitted in Printing]

SEP 18 1968

**ROBERT M. STEARNS, Clerk** INTERVENING CLAIM OF FRED C. SACKS

Intervening claimant, FRED C. SACKS, in support of his claim for an attorney's fee against the funds deposited in this action respectfully states as follows:

1. In January of 1964, claimant, attorney at law practicing in the District of Columbia, was retained by the officers of FOX-GREENWALD SHEET METAL CO., INC., a corporation, to represent them in a dispute arising between the corporation and MARKOWITZ BROTHERS, INC., resulting from the performance of work at the National Bureau of Standards, Gaithersburg, Maryland, at which time the said corporation agreed to retain claimant on a contingency basis which provided that the claimant was to receive as a fee for legal services 25 percent of any moneys recovered for the benefit of the said FOX-GREENWALD SHEET METAL CO., INC.

2. Claimant thereafter entered into conferences with said MARKOWITZ BROTHERS, INC., and the representatives of the Internal Revenue Bureau in an effort to avoid litigation, which conferences were unsuccessful and thereafter claimant, on behalf of the said FOX-GREENWALD SHEET METAL CO., INC., filed an action in the United States District Court for the District of Columbia in May of 1964 and continued in the preparation of said action until December of 1966 at which time the action went to trial before Judge McGarraghy and a jury. After a trial consuming eight days, the jury returned a verdict in favor of FOX-GREENWALD SHEET METAL CO., INC., said judgment being thereafter appealed to the United States Circuit Court of Appeals for the District of



Columbia, which appeal was resisted by claimant entailing research, filing of brief and argument before the Court, said judgment being affirmed on June 25, 1968.

3. In 1964, claimant was served with a notice of levy by the Internal Revenue Bureau attaching all funds that might come into the hands of the claimant for the benefit of FOX-GREENWALD SHEET METAL CO., INC., representing a claim for withholding and social security taxes which the Internal Revenue Bureau had asserted against claimant's client.

4. Claimant conferred with a representative of the Internal Revenue Bureau regarding the distribution of the funds to be received in satisfaction of the judgment, and it was agreed and understood that claimant would receive 25 percent of the total amount received from Continental Casualty Company, one of the Defendants in the action against whom the judgment was rendered, and the balance of 75 percent would be distributed to the Internal Revenue Bureau in partial satisfaction of the levy made on the claimant.

5. Claimant was thereafter advised by counsel for Continental Casualty Co. that a number of attachments were served on the said Continental Casualty Co. in addition to which a notice of an assignment executed by FOX-GREENWALD SHEET METAL CO., INC., in favor of Blake Construction Co., Inc., dated August 27, 1963, had been served on them and they, therefore, were unable to determine to whom the funds should be distributed.

6. Claimant asserts that he is entitled to an attorney's lien under the existing law of the District of Columbia and under the provisions of the Federal Tax Lien Act of 1966, Title 1, Section (8).

Fred C. Sacks  
FRED C. SACKS, Claimant

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

FILED

NOV 4 1968

FOX-GREENWALD SHEET METAL  
CO., INC.,

Plaintiff

ROBERT M. STEARNS, Clerk

**V.**

CIVIL ACTION NO. 1693-64

**MARKOWITZ BROTHERS, INC.,  
and CONTINENTAL CASUALTY CO.,**

### Defendants

## ORDER

Upon consideration of the motion of the United States of America  
to intervene and its complaint in intervention, and pursuant to the  
~~order of this Court dated August 20, 1968, requiring said interested~~  
in order that the United States of America may  
~~exercise its right to participate in the proceedings, it is ordered that~~  
venerable and assert their claims to the fund before the Court, it is  
this 14th day of November, 1968,

ORDERED, that the United States of America be and is hereby granted leave to file its complaint in intervention instanter.

**JUDGE**

FILED

NOV 22 1968

COMPLAINT IN INTERVENTION

ROBERT M. STEARNS, Clerk

The intervenor, the United States of America, by its attorneys, complains and alleges:

I

The United States intervenes herein to enforce its tax liens against the rights of the taxpayer, Fox-Greenwald Sheet Metal Co., Inc., to a fund representing a judgment in favor of the taxpayer and paid into the Court Registry, and more fully described in the accompanying Motion for Leave to Intervene.

II

This action is brought at the direction of the Attorney General of the United States of America and with the authorization and sanction of the Chief Counsel of the Internal Revenue Service, a delegate of the Secretary of the Treasury of the United States of America, in accordance with Section 7401 of the Internal Revenue Code of 1954.

III

Jurisdiction of this Court is invoked under Section 7402(a) of the Internal Revenue Code of 1954 and Sections 1340 and 1345 of Title 28 of the United States Code, as hereinafter more fully appears for the reasons that this action is brought by the United States; arises under an Act of Congress providing for internal revenue; and seeks a judgment to enforce the intervenor's tax liens and for other relief necessary and appropriate to the enforcement of the Internal Revenue laws.

## IV

Assessments have been made against the plaintiff-taxpayer, Fox-Greenwald, by a duly-authorized delegate of the Secretary of the Treasury for federal withholding and Federal Insurance Contribution Act taxes, penalties and interest for the taxable years 1963 and 1964. Notice of and demand for payment of these assessments were made upon Fox-Greenwald, but there remains outstanding a balance of \$112,189.45 plus accrued interest, all as more fully set forth below:

<u>TAXABLE PERIOD</u>	<u>ASSESSMENT DATE</u>	<u>AMOUNT ASSESSED</u>	<u>DATE OF NOTICE AND DEMAND</u>	<u>UNPAID BALANCE</u>
3/Q/63	12/16/63	\$60,926.36(T) 194.87(I)	12/16/63	\$24,261.07
4/Q/63	2/12/64	62,240.04(T) 3,112.00(P) 1,037.15(P) 122.61(I)	2/12/64	58,337.30
1/Q/64	4/16/64	25,282.17(T) 673.18(P)	4/16/64	25,955.35
1963	3/13/64	3,611.14(T) 24.59(I)	3/13/64	3,635.73
				<hr/> \$112,189.45*

\* = Plus accrued interest

(I) = Interest

(P) = Penalties

(T) = Tax

## V

Notices of federal tax liens covering the tax liabilities for the years 1963 and 1964 were filed with the Clerks of the Circuit Courts for Baltimore City and Anne Arundel, Montgomery and Prince Georges Counties, Maryland, as more fully set forth below:

<u>TAXABLE PERIOD</u>	<u>27 DATE LIEN FILED</u>	<u>PLACE LIEN FILED</u>
3/Q/63	2/17/64 2/18/64 2/19/64 2/19/64	Pr. Geo. Co., Md. Mont. Co., Md. Anne Ar. Co., Md. Balto. City, Md.
4/Q/63	2/17/64 2/18/64 2/19/64 2/19/64	Pr. Geo. Co., Md. Mont. Co., Md. Anne Ar. Co., Md. Balto. City, Md.
1/Q/64	4/27/64 4/23/64	Pr. Geo. Co., Md. Mont. Co., Md.
1963	5/8/64 5/6/64	Pr. Geo. Co., Md. Mont. Co., Md.

#### VI

By reason of the assessments as set forth in paragraph IV, tax liens arose in favor of the United States of America as of the dates of the assessments, which liens attached to all property and rights to property, whether real or personal, belonging to taxpayer Fox-Greenwald, including the fund before the Court.

#### VII

On May 8, 1964, a notice of levy was served upon the defendant Continental Casualty Company, in order to reach taxpayer Fox-Greenwald's interest in any judgment it might obtain against Continental Casualty Co. Continental Casualty has refused to honor said levy.

WHEREFORE, petitioner United States of America prays:

1. That the Court adjudge and decree that plaintiff-taxpayer Fox-Greenwald Sheet Metal Co., Inc., is liable to the United States for unpaid federal taxes in the amount of \$112,189.45 plus interest and additions as provided by law, and costs.
2. That the Court adjudge and decree that the United States has valid and subsisting liens upon all the property of the plaintiff-

taxpayer Fox-Greenwald Sheet Metal Co., Inc., including the fund before the Court.

3. That the Court determine the validity and priority of all liens and claims against said fund, including the tax liens of the United States, and order a distribution of the fund in accordance with said determination.

4. For such other relief as the Court may deem proper.



MITCHELL ROGOVIN

Assistant Attorney General  
Tax Division



FRED B. UGAST

Chief, General Litigation Section



STEPHEN V. WILSON

Attorney, General Litigation Section



DAVID G. BRESS

United States Attorney  
Of counsel

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FOX-GREENWALD SHEET METAL  
CO., INC.

Plaintiff

vs.

MARKOWITZ BROTHERS, INC.

and

CONTINENTAL CASUALTY CO.

Defendants

CIVIL ACTION NO. 1693-64

**FILED**

JAN 6 1969

ROBERT M. STEARNS, Clerk

ORDER

Counsel for the United States of America, Blake Construction Co., Inc., and Fred C. Sacks, appearing pro se, representing all of the intervening claimants in this matter having appeared in open Court on November 8, 1968, and entering into a stipulation wherein it was agreed that the claim of FRED C. SACKS for payment of his attorney's lien would not be disputed and was a superior lien to that of the other claimants,

IT IS on this 6<sup>th</sup> day of January, 1969,

ORDERED that the Clerk of the Court pay to FRED C. SACKS from the funds on deposit the sum of Twenty Eight Thousand Four Hundred Fifty One Dollars and Seventeen Cents (\$28,451.17) representing his fee and Four Hundred Twenty Seven Dollars and Eighty Cents (\$427.80) representing advanced costs and that said sums be paid forthwith upon the filing of this Order with the Clerk of the Court.

*Laurance M. Cohen*  
Atty. Dept. of Justice  
United States

*Robert D. Rosenman*  
atty for Blake Construction Co., Inc.

*Joseph E. McGonaghy*  
JUDGE

STANLEY SEYMOUR BENDER

was called as a witness on behalf of Blake Construction Company, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q Will you tell the Court your name and address, please?

A Stanley Seymour Bender, 2901 Fessenden Street, Northwest, Washington, D. C.

Q Mr. Bender, are you an officer in the firm and corporation of Blake Construction Co., Incorporated?

A I am.

Q What is your title?

A Treasurer.

Q What was your title or position with that company, the intervenor here, in 1963, say, in August of 1963?

A Treasurer.

Q Were you familiar with the contracts and sub-contracts and work being performed at the National Bureau of Standards buildings at Gaithersburg, Maryland?

A Yes, I am.



- 3 -

Q Without going into detail, did that involve the construction of a large complex of five buildings and a job that took some period of time to complete?

A Yes, it did.

Q Who was the prime contractor on the National Bureau of Standards job?

A Blake Construction Company.

Q GSA acting for the United States was the owner?

A Yes, sir.

Q Who was the mechanical subcontractor of Blake Construction Company?

A Markowitz Brothers, Incorporated.

Q Markowitz Bros., Inc., is that a Florida corporation?

A Yes, it is.

Q With whom did you deal as an official of Blake with regard to the Markowitz matters, if you did so deal?

A Ben Markowitz, Marvin Markowitz, Grady Lawrence and several other people that worked for Markowitz.

Q Who were the officers of Markowitz with whom Blake dealt?

A Ben Markowitz and Marvin Markowitz.

Q Do you recall the approximate amount of the mechanical subcontract on that job?

- 4 -

A \$4,850,000.

Q Did the work encompassed by the mechanical sub-contract include, among other things, sheet metal work?

A Yes, it did.

Q Who was to perform the sheet metal work?

A Through its subcontract with Fox-Greenwald, they were supposed to do the sheet metal work.

Q In other words, that was a sub-subcontract between Markowitz and Fox-Greenwald?

A Yes, it was.

Q Did Blake itself have any direct contractual dealings before we got into the matters of a loan, with the sheet metal sub-subcontractor?

A No, it did not.

Q What was the form of organization of the Fox-Greenwald Company?

A I don't understand the question.

Q Was that a combination of some kind?

A Yes, it was.

Q Describe it, please.

A In the performance of Markowitz's subcontract with Blake and during the negotiations, Mr. Ben Markowitz had a sheet metal subcontractor that had done some work for them previously, known as the Fox Sheet Metal Company.

- 5 -

Q Fox Sheet Metal Company?

A Fox Sheet Metal Company, in Denver, Colorado.

At that time, he was interested in finding somebody to get together with the Fox Sheet Metal Company from the Washington area to perform the sheet metal work on the Bureau of Standards Phase II Project.

Q What was done then in that regard?

A We suggested they contact a Mr. Max Greenwald, which they did, and I assume through the various discussions, they agreed to get together with the Fox Sheet Metal Company and form the Fox-Greenwald Company in order to perform this sheet metal work for the Markowitz Brothers.

Q Did the Fox-Greenwald Company then consist essentially of the Colorado corporation of the Fox Company and the local corporation of Mr. Greenwald?

A Yes.

Q Do you recall about when performance of the work got under way out there, particularly the mechanical and the sheet metal?

A Sometime in February of 1963.

Q What was the situation on the job, at least in so far as it involved Blake, Markowitz and Fox-Greenwald, in the summer of 1963?

A I don't understand.

Q I am asking you now to go briefly into this loan of \$50,000. How did it come about, and what was its purpose?

A Sometime in the early part of August, Mr. Max Greenwald came into our office and talked to me and he talked to my father about getting some money in order to meet their payrolls inasmuch as the Markowitz Brothers were cutting their requisitions. After a series of conversations we had agreed that we would lend them \$50,000 in order to meet their payrolls if Markowitz Brothers would agree to an assignment.

During that time, Mr. Max Greenwald and myself called Mr. Ben Markowitz in Florida. He saw no objection.

Q Just a minute. What was the approximate date of the conversation that you had on behalf of Blake with Mr. Ben Markowitz in Florida -- the approximate date.

A Some time around between the 20th and the end of the month, in August of 1963.

Q Was it before any of these notes and loans were made or after, or during?

A We had the conversation before the notes were drawn.

Q Why did Fox-Greenwald tell you they needed \$50,000?

A In order to meet payroll.

- 7 -

Q What did you and Ben Markowitz say to each other in this telephone conversation about the middle of August, 1963. Tell what you can, as well as you can remember.

MR. SACKS: I don't like to interfere with testimony, but I object to the telephone conversation.

THE COURT: Objection overruled.

BY MR. MILLER:

Q First of all, had you previously had a number of conversations with Ben Markowitz, and did you know his voice both directly and on the telephone?

A Yes, I did.

Q Who placed the call and to whom?

A I believe I placed the call, in my office.

Q To whom?

A In the presence of Max Greenwald to Mr. Ben Markowitz, in Miami, Florida.

Q To what point in Miami, Florida was the call placed?

A To what point?

Q Where did the call go?

A To Markowitz Brothers Company, Incorporated, in Florida.

Q Did you recognize the voice of Ben Markowitz and did you know, without any question, that you were talking to

- 8 - Mr. Ben Markowitz, the president of Markowitz Brothers Construction Company?

A Yes, I was talking to Mr. Ben Markowitz.

Q Please tell what you said, as best as you can recall it.

MR. SACKS: I object to the conversation, if the Court please.

THE COURT: On what ground?

MR. SACKS: Hearsay as to what Ben Markowitz told him.

THE COURT: I will overrule the objection.

BY MR. MILLER:

Q You may proceed.

A I told Ben that I had Mr. Max Greenfield in the office and that we were -- "we," that is, Blake Construction Company -- willing to make the Fox-Greenwald Company a \$50,000 loan, provided they would accept an assignment.

Q Provided who would accept---

A Markowitz Brothers would accept an assignment from Fox-Greenwald, turning to Blake Construction Company on its next requisition in order that we would be able to collect the money.

Q What was said?

A Mr. Markowitz agreed that---

- 9 -

Q What did he say?

A Well, he saw no reason--- On the phone, he said he saw no reason why that could not be accomplished, and that he would agree to that. On that basis, I gave the Fox-Greenwald Company a \$20,000 check and took a demand note until such time as all the rest of the papers were drawn up, sent to Denver, signed and sent back to Blake Construction Company, at which time I gave them the additional \$30,000 check and was informed that the assignment was then in the hands of the Markowitz Company, and it would be forthcoming to Blake Construction Company.

Q Had you not been told by Mr. Ben Markowitz of the Markowitz Construction Company that he would approve the assignment to secure the loan, would Blake Construction Company have loaned the \$50,000 that you have described?

A No, we would not have.

MR. MILLER: I will ask to have marked and then show counsel the documents that have been referred to.

THE COURT: Yes.

THE CLERK: Blake's Exhibits Nos. 1, 2, 3, 4, 5 and 5-B marked for identification.

(Blake's Exhibits Nos. 1, 2, 3

4, 5 and 5-B marked for ident.)

MR. SACKS: I have no objection to any of the exhibits, your Honor. I don't know about the Government.



- 10 -

(Miss Cohen examined documents.)

BY MR. MILLER:

Q Mr. Bender, I will hand you now document which has been marked for identification as Plaintiff's Exhibit No. 1 and ask you to examine it and identify it, please.

A (Reading) This is the collateral assignment that we requested from the Fox-Greenwald Company.

Q What does it assign, to whom, and who signed it?

A It is an assignment by the Fox-Greenwald Sheet Metal Company, pursuant to an agreement with Markowitz Brothers, Incorporated, a contract that they had for \$1,050,000, assigning \$50,000, as evidenced by promissory note, to Blake Construction Company, signed by Max-Greenwald, Vice-President of Fox-Greenwald Sheet Metal Co., Inc., and notarized.

Q Can you identify Mr. Greenwald's signature to that assignment?

MR. SACKS: Your Honor, we don't dispute the authenticity of the document. We stipulate everything contained in there was there.

THE COURT: What is the date of it?

MR. MILLER: August 27, 1963. If you accept the stipulation, then I will offer into evidence Plaintiff's Exhibit No. 1.

- 11 -

THE COURT: Any objection?

MISS COHEN: No, your Honor.

THE COURT: Without objection, it will be received.

(Plaintiff's Exhibit No. 1 was  
received.)

MR. MILLER: Is Plaintiff Blake's Exhibit 2, Promissory Note dated August 27, 1963 in the amount of \$50,000 due 60 days after date, from Fox-Greenwald Sheet Metal Co., Inc., to Blake Construction Co, signed by Max Greenwald, Vice-President, attested by the Secretary; and does it also contain an endorsement of guarantee of payment, signed by Max Greenwald & Sons, Inc., Sam Fox Sheet Metal Company, by Sam E. Fox, individually and, Philip Fox individually—

MR. SACKS: Your Honor, we will stipulate all the documents are genuine and authentic, and may be admitted.

THE COURT: Does the Government make the same stipulation?

MISS COHEN: Yes, your Honor.

MR. MILLER: I will then offer into evidence Plaintiff Blake's Exhibit 2, being Promissory Note and endorsement; Plaintiff's Exhibit 3, being minutes of Board of Directors, with Max Greenwald & Sons, Inc.; Plaintiff's Exhibit 4, being the minutes of the meeting of Board of

12 - Directors, of the Sam Fox Sheet Metal Company; Exhibit 5-A which consists of 2 checks, the first one dated August 15, 1963 to Fox Greenwald from Blake Construction signed by Mr. Bender in the amount of \$20,000; and the second one also of the same exhibit, dated August 27, 1963 with the same persons as parties thereto, in the amount of \$30,000. And I offer also the endorsements which appear on 5-B on the reverse side of those checks.

THE COURT: Without objection, those exhibits will be received.

(Plaintiff Blake's Exhibits 2, 3, 4, 5-A and 5-B were received in evidence.)

MR. MILLER: I see, your Honor, that I left out the minutes of the meeting of the Board of Directors of the Fox-Greenwald Sheet Metal Company. I will ask to have that marked and offered in evidence.

THE CLERK: Blake's Exhibit No. 6 marked for identification.

THE COURT: Without objection, it will be received.

MR. SACKS: Same stipulation, your Honor.

(Blake's Exhibit 6 was marked and received into evidence.)

- 13 -

BY MR. MILLER:

Q Following your telephone conversation you have described about the middle of August 1963, between yourself and Mr. Ben Markowitz, was there any further communication, written or oral, between the Blake Company and the Markowitz or Fox-Greenwald concerning this assignment?

A Yes, there were.

Q Tell what occurred.

A On several occasions, on meeting Mr. Ben Markowitz at the project, he told me that the assignment would be sent up to us, and they just hadn't gotten the proper people to sign it, and that it would be coming to Blake Construction Company shortly.

This went on for some two months, at which time in a letter that I wrote to the Markowitz Company, I asked him to finally send up the assignment. Sometime thereafter -- this was the early part of November, I think I wrote the letter -- Mr. Ben Markowitz said that they were not going to sign the Assignment, that was the end of it! At that point, there was nothing I could do to force him to sign the agreed-to assignment, and I just dropped it.

Q As you dropped it, what did you drop?

A Well, I didn't pursue it any further when Mr. Markowitz said he would absolutely not sign -- agree to the Assignment.

- 14 -           Q     Did you subsequently have discussions concerning the Assignment with anyone else, that is to say Internal Revenue or anyone from Markowitz? Just yes or no.

MR. SACKS: If the Court please, I will object.

THE COURT: The objection is sustained.

MR. MILLER: I will ask to have marked, your Honor, the letter of November 1, 1963. It is to Markowitz Bros., Inc. from Blake Construction signed by Stanley Bender.

THE CLERK: Exhibit Number 7 of Blake marked for identification.

MR. SACKS: No objection.

THE COURT: Does the Government have any objection?

MISS COHEN: No, your Honor.

THE COURT: Without objection, it will be received.

BY MR. MILLER:

Q     Mr. Bender, is Plaintiff's Exhibit, the letter you referred to remarking on the assignment dragging on for some time -- is that the letter you just testified about?

A     It is a copy of it, yes.

MR. MILLER: I believe it's been received.

THE COURT: I said it would be received because there is no objection to it.

(Blake's Exhibit No. 7 marked for  
identification and received.)

- 15 -

BY MR. MILLER:

Q What happened with reference to the payments or moneys on this job after the last day that you mentioned, which I believe was November of 1963?

A Payments to whom?

Q Did matters culminate in the continuance of work at the job, or what happened from that point?

A I think the early part of November, I finally prevailed upon Max Greenwald to give us at least an interest check. I think we got a \$500 check for 60 days' worth of interest or 30 days' worth, I forget what it was.

Q What was the amount?

A \$500. At that time, there were many discussions about how they were going to pay us, and inasmuch as Markowitz was not paying them their full requisition at that point, Mr. Greenwald did not see how he could pay anything at all unless his requisitions were paid in full by Mr. Markowitz. This culminated February 12th, I believe, in Markowitz' terminating Fox-Greenwald's contract, and from that point forward, we never collected any money from Fox-Greenwald.

Q Was that February of 1964?

A Yes, it was.

Q It was your understanding from Markowitz and from Fox-Greenwald that the Fox-Greenwald subcontract had been



- 16 -

terminated in some fashion, and they were no longer on the job?

A That is correct.

Q Did Blake Construction Company or its officers have any conversations with the the Internal Revenue Service concerning any alleged claims by it against Fox-Greenwald?

MR. SACKS: Objection, if the Court please.

THE COURT: You object?

MISS COHEN: Yes, your Honor, I do.

THE COURT: Objection sustained.

MR. MILLER: May I make an offer of proof then for the record, your Honor?

THE COURT: Yes.

Do you want the exhibit?

MR. MILLER: No, I won't need the exhibit.

I offer to prove that if the witness, Mr. Stanley Bender, an officer of Blake Construction Company were permitted to answer the question as to subsequent conversations with representatives of the Fox-Greenwald Company, the plaintiff in the present suit, and the Internal Revenue Service regarding claims by the latter against Fox-Greenwald, which claims, I believe, are in part, at least, for taxes asserted as part of the claim in this instant proceeding, that the witness would answer that he did have conversations and was present at

17 - conversations which discussed the whole gambit.

THE COURT: What is the materiality of it?

MR. MILLER: I guess I was simply replying to the statement in the opening statement, your Honor, that this is a 5-year-old, concealed assignment, whereas, in fact, I am offering to show the assignment was made known and discussed by Blake with both the parties represented here, Fox-Greenwald and Internal Revenue Service of the United States, that they were fully aware of this back in at least 1964.

THE COURT: What difference does it make?

MR. MILLER: I don't think it does, but I understood they were asserting it as a purported offense, your Honor. If it doesn't make any difference, then I won't belabor it.

THE COURT: You have made your offer of proof.

BY MR. MILLER:

Q Has Blake been paid the \$50,000 evidenced by the documents which show the note and the assignment, either the principal or any amount on interest other than the \$500. payment that you have described?

A No.

Q So far as you are concerned, the entire amount with interest is due and owing today?

- 18 -

A Yes, it is.

MR. MILLER: I believe, your Honor, that's all I have at this point. I am not sure of the nature of some of the defenses, but I believe this is our case at the moment.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. SACKS:

Q Mr. Bender, during the course of your testimony at the U.S. District Court in Baltimore, do you remember this question:

"Well, what was your position about getting the Assignment approved on October 28th? Did you insist on it or did you say that it did not matter?

And your answer being:

"A When Mr. Markowitz told me he was not going to give the Assignment, I dropped the matter."

Do you recall that?

A Yes. I don't recall making that on October 28th. I don't think that I would have sent the letter of November 1st if ~~he~~ told me he was not going to sign the Assignment.

Q But I am speaking about your testimony in the course of that trial, and I hold in my hand a transcript of that testimony.

- 19 -

MR. MILLER: Pardon me. I think perhaps, your Honor, the witness or we, at least, should know the context of the matter, if he is reading a transcript.

THE COURT: I understood you are reading from the transcript.

MR. SACKS: From the transcript. They supplied it.

MR. BLAKE: We supplied what information we had.

MR. SACKS: They supplied it.

MR. MILLER: Fine. What page is it?

MR. SACKS: 521 and it is Blake's Exhibit No. 4 at that trial, and I have read the question and answer as it appears of Mr. Bender during the course of that trial.

THE COURT: Did you so testify, Mr. Bender?

THE WITNESS: I did, your Honor.

BY MR. SACKS:

Q So, let me ask you: When you said you "dropped the matter," you were referring to the Assignment, I believe?

A Yes.

Q So, that as of that date back in October, you had dropped the idea of the Assignment, is that correct?

A Not in October, no.

Q Then, in November, let's say; did you drop the matter of the Assignment in November?

A Yes, I did.

- 20 -

Q So, in November of 1963, you had dropped the so-called value of the Assignment, or whatever you attached to it, and thereafter, from November 1963 and let's say '64, '65, '66 and '67, did you at any time assert the existence of the Assignment?

MR. MILLER: Just a minute. Objection, your Honor.

THE COURT: The objection is overruled.

MR. MILLER: The first part of the question---

THE COURT: No. The objection is overruled.

MR. MILLER: Would your Honor listen to the first part which I think qualifies the --- May I have it re-read?

THE COURT: Will you read the first part?

(The last question was read back by the reporter.)

MR. MILLER: Could I be heard at the bench on that?

THE COURT: Yes, you may come to the bench.

(AT THE BENCH:

MR. MILLER: The objection to the question, your Honor, is that it is in two parts and the first assumes or states that he had dropped the value of the Assignment which I don't believe was what the witness testified to. What he testified was, he no longer tried to get the consent by Markowitz.

Then, he goes on to say:

"Did you raise the question in the subsequent years?"

THE COURT: I think the question is clear. He

21 - can answer it.

(BACK IN OPEN COURT:

THE COURT: Do you remember the question, sir?

THE WITNESS: Yes.

THE COURT: What is your answer?

THE WITNESS: In two meetings that I attended in, I believe, February, early February 1964, I attended a meeting at the Sheraton Park.

BY MR. SACKS:

Q Park Sheraton?

A Park Sheraton.

THE COURT: Park Sheraton in Washington?

THE WITNESS: Yes.

THE COURT: That's not the name of it. It's Sheraton Park. I have lived there for 30 years.

THE WITNESS: --with Mr. Ben Markowitz, his attorney, Mr. Phil Fox, Mr. Max Greenwald and two gentlemen from the Internal Revenue whose names I do not remember, in regard to the levy that was served on Blake Construction Company. In conversations during the meetings at that time, it was made known that we had a note and an Assignment. I didn't make any assertions that we were going to collect on the Assignment because at that point, Mr. Markowitz, and prior to that time, had refused to sign it or to recognize it.



- 22 -

BY MR. SACKS:

Q Mr. Bender, at that meeting, I was there also, was I not?

A I don't know if you were at both of them. I think you were at one of them.

Q But don't you recall that the only question of an Assignment was the offer by Fox Greenwald to make an Assignment to the Internal Revenue Bureau if Markowitz would pay the money that was drawn under the requisition, and that was the only Assignment that was mentioned?

A I don't believe so.

Q All right, let's go from the February -- And I believe the meeting was -- and you correct me if I am wrong -- the first meeting was February 11 and thereafter there was a second meeting on February 14, is that correct?

A I think so, yes.

Q Let's go to the last meeting starting from February 14, 1964, did you thereafter at any time advise anyone, or assert the existence or validity of the Assignment that you received back in 1963?

A No.

Q Isn't it true that until the Court of Appeals in June 1968, affirmed the judgment that Fox-Greenwald had recovered, that after that, it was the first time that Blake asserted or advised anyone about the existence of this Assignment?

-23 -

A Well, prior -- There was, at the meeting I think either February 11th or 14th.

Q Yes. We are taking from that point on, from 1964.

A No, I did not.

Q So, from 1964 until July of 1968 -- I believe that's almost 4-1/2 years later -- no one ever mentioned, from your corporation, about the existence of the Assignment, is that correct?

A That's correct.

Q When you first got this Assignment back in August of 1963, you were aware then that the contract that was in existence between Markowitz and Fox-Greenwald contained a provision which specifically prohibited Fox-Greenwald from making any assignment, are you not?

A It's just like--- Yes.

Q So at that time, and it is stated in your Assignment, that there was a certain contract in existence, and you made reference to it by the date and by the amount of contract, there was a section which required you to get written consent before accepting an assignment, is that correct?

A Yes.

Q So that when you parted with the \$50,000 -- \$20,000 you parted with on August 15, 1963, which was some 12 days prior to the date, and then an additional \$30,000 on August 27, 1963, you were fully aware that you had no right under that

- 24 - contract to accept an Assignment that was not consented to in writing by Markowitz, is that correct?

MR. MILLER: Just a minute. I am going to object to that as being an improper statement of law.

THE COURT: I will overrule the objection. He can answer it.

THE WITNESS: On the telephone, Mr. Markowitz had agreed that he recognized the Assignment, and on that basis I advanced the Fox-Greenwald Company \$20,000 until all the papers they had to get together, got back to me. At that point, I gave them the additional \$30,000 and was told that the Assignment was in Florida, to be executed, and that the Assignment would be coming from Markowitz shortly after that period.

Q Going back to my original question, Mr. Bender, excluding the fact -- and I believe your testimony is, you believed that Markowitz was going to give you the---

A I didn't believe; he said he would give it to me.

Q But what I am asking you is that you knew, at the time you parted with that money, that the written consent was necessary in order to make that a valid Assignment, wasn't that---

MR. MILLER: It is objected to. It is not necessary to make it a valid Assignment as between Fox-Greenwald and Blake.

- 25 -

THE COURT: Objection overruled.

BY MR. SACKS:

Q That's correct, is it not?

A I wouldn't know.

Q You wouldn't know?

A I don't know if it would be valid or invalid.

I am not an attorney.

Q Let me rephrase it: You knew that it was necessary to have a written consent?

A Yes.

Q Thereafter, there came a time, back in 1964, March to be exact, that Blake Construction Company was put on notice that a suit was to be filed against it by Fox-Greenwald seeking to recover under the Miller Act, is that correct?

A I guess so.

MR. SACKS: May I have this marked for identification?

May I ask your Honor if it is necessary to reintroduce the contract which has already been in evidence in this case?

THE COURT: Has it been in evidence in this case?

MR. MILLER: I think he means the original suit.

MR. SACKS: The original Fox-Greenwald versus Markowitz.

- 26 -

THE COURT: Frankly, I am a little concerned. There were a lot of things said this morning that I am wondering if they were a matter of record in this case.

Do I notice—

MR. SACKS: They are in this case but they have been withdrawn since the appeal.

THE COURT: I see.

MR. SACKS: For example, I hold in my hands Plaintiff's Exhibit which was evidence in this case, but was returned to me.

THE COURT: I think you had better re-introduce it.

THE CLERK: Fox-Greenwald's Exhibit No. 1 and Fox-Greenwald's Exhibit No. 2.

(Fox-Greenwald's Exhibits 1 and 2  
were marked and introduced.)

THE COURT: I have a recollection that some of this was gone into before at the trial on the merits of Fox-Greenwald.

MR. MILLER: We have no problem with Exhibit 2 which is the original contract.

MR. SACKS: I offer it into evidence.

MISS COHEN: Mr. Sacks, may I see it?

MR. SACKS: Exhibit No. 2, if the Court please, is the original contract.

27 -

MR. MILLER: I object to Exhibit 1, not on the grounds that this is the document, but rather as to its relevancy, for the reason that it gets into matters of claim by Fox-Greenwald against all the other parties, and to get into that opens up then the question of defenses to those claims. I think it is not necessarily material in this present hearing.

MR. SACKS: Your Honor, I will proffer it in this respect: I am not attempting to establish any claims by Fox-Greenwald's Exhibit No. 1. The purpose is merely to show that Blake had notice that Fox-Greenwald was making a claim against it, in order to show that thereafter nothing was ever countered by Blake as to the existence of this Assignment from March of 1964, so that they cannot say now, "if we knew that we were going to be sued by Fox, we would have set up the Assignment as a sort of a set-off," and this puts them on notice.

THE COURT: I will receive it for that limited purpose.

THE COURT: I am assuming the Government does not object to it.

MISS COHEN: Thank you your Honor.

(Fox-Greenwald's Exhibit 2 and 1  
received.)

THE COURT: I understand the Government does not



- 28 -     object to the Exhibit 1 and it will be  
received for the purpose indicated.

BY MR. SACKS:

Q     Mr. Bender, you were aware that a suit was filed by  
Box-Greenwald against Markowitz in the U.S. District Court  
in Washington, were you not?

A     Yes.

Q     From the date of the filing of that suit in 1964,  
in July of 1968, did you or your counsel on your behalf,  
ever put either Fox-Greenwald or its counsel on notice that  
you were in possession of an Assignment on which you intended  
to rely for payment?

A     I don't believe so.

MR. SACKS: I have nothing further.

CROSS-EXAMINATION (Continued)

BY MISS COHEN:

Q     Mr. Bender, I would like to clear up with you the  
course of events from the time that Fox-Greenwald first  
approached you to obtain this \$50,000 loan and the time that  
you issued the checks to them and received the promissory  
note and the assignment here. Can you tell us again when you  
were first approached by Fox-Greenwald or Mr. Greenwald?

A     In the early part of August.

Q     And when you were first approached, what did you  
do then?

- 29 -

THE COURT: 1963?

THE WITNESS: 1963, yes.

BY MISS COHEN:

Q At that time, did you contact the Markowitz people in Florida?

A In Mr. Greenwald's presence, I think we did contact Mr. Markowitz. I don't know the exact date.

Q Was that by correspondence or telephone or personal visit?

A By telephone.

Q You are sure about that?

A I believe so, yes.

MR. MILLER: Well,---

BY MISS COHEN:

Q Excuse me?

A Yes.

Q You are sure it was by telephone?

A Yes.

Q Can you tell us the substance of that conversation again?

A Mr. Greenwald and myself asked Mr. Ben Markowitz whether he would have any objection to allowing an Assignment from Fox-Greenwald running to Blake Construction Company in the amount of \$50,000.

- 30 -

Q And what was his reply to you?

A He stated he saw no reason why he could not agree to that.

Q And did he say that he did agree or that he would agree in the future?

A He said that he did agree.

Q I see. Did you know what position in Markowitz Brothers Mr. Ben Markowitz held?

A He was the president.

Q Can you tell me, is it your business practice to accept the word of one member of a corporation without any indication whether this is the binding word of the corporate board of directors?

A That's correct. That's the practice in the construction industry.

Q Can you tell me, in your corporation, is it common practice for one board member to bind the corporation without any prior board meeting?

A Board member? Or officer?

Q Officer. Excuse me.

A It has been done, yes.

Q But it is not automatically done? There have been times when officers have been overruled by their board?

A No. We are the board.

31 -

Q Let me ask you this: Mr. Ben Markowitz was one officer of Markowitz Brothers, Incorporated, is that correct?

A Thats correct.

Q And were you aware of the fact that there were other officers of this corporation?

A Yes.

Q You were aware of that fact?

A Yes.

Q Were you also aware of the fact that in the contract which was to be assigned to you, there was a provision that required the approval of Markowitz to any Assignment?

A Yes.

Q And were you aware that that approval must be in writing?

A Yes.

Q And that the approval must be given before the Assignment is made?

A If that's what is in this contract.

Q That is what is in the contract?

A Yes.

Q Can you tell me on what date the Assignment was given to you? I believe it was August 27, 1963.

A August 27th, yes.

Q Can you tell me if at any time, either before or after

- 32 - that Assignment was given, you received any written document from Markowitz Brothers which approved that assignment?

A No, I did not.

Q You did not. Can you tell me whether you ever requested such approval?

A Yes, I did.

Q Can you tell me when you did that?

A Over a period of two months, culminating in the letter that I wrote on November 1st.

Q I believe there has been offered in evidence a letter dated November 1, 1963.

A That's correct.

Q MISS COHEN: I am afraid I don't have the number of that exhibit.

THE CLERK: Number 7.

BY MISS COHEN:

Q This was Blake's Exhibit No. 7 -- it was a letter dated November 1, 1963.

A Yes.

Q Can you tell me if there were any letters written before this?

A No, there weren't.

Q Not by Blake, that is?

A No. That's correct.

Q I see. So that this was the first time that you,

33 - in written communication at least, requested a written approval by Markowitz of this Assignment?

A Yes.

Q I see. Can you tell us if there were any other conversations before that letter was written in which you requested written approval of the Assignment?

A There were numerous conversations with Mr. Ben Markowitz—

Q —requesting him to send the approval of the Assignment —

A requesting him to send the approval of the Assignment back to Blake Construction Company.

Q There has been admitted in evidence copies of checks issued by Blake to Fox-Greenwald, one of these checks being dated, I believe, August 15, 1963. Can you tell us if before that check was issued, there had been any conversations with Mr. Ben Markowitz?

A The day the check was issued, I believe.

Q The day the check was issued. I see. Can you tell us if any conversations with Mr. Ben Markowitz ensued between the time that check was issued on August 15, 1963 and the date of the next check which was August 27, 1963?

A No, no other conversations that I can recall.

Q So that a period of 12 days lapsed between the issuance of the first check and, as you claim, the initial



- 34 - request for approval of the Assignment, and the issuance of the second \$30,000 check, during which there was no communication between your office and Mr. Markowitz?

A That's correct.

Q And yet you, nonetheless, issued this second check, even though you had not at that time received written approval of the Assignment?

A Well, the day I gave him the second check, I had received the notes and the minutes of the meeting.

Q What notes and minutes are you referring to?

A That note from Fox-Greenwald; the minutes of this board of directors meeting, agreeing---

Q But you had no communication with Markowitz, the party that had to approve this Assignment?

A At that point when they brought those assignments in?

Q Yes.

A I was told the approval for the Assignment had been mailed to Mr. Markowitz and it would be forthcoming to our office.

Q But you had no personal knowledge of this?

A No, I did not.

MISS COHEN: I see. I have no further questions, your Honor.

- 35 -

THE COURT: Do you have any redirect, Mr. Miller?

MR. MILLER: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. MILLER:

Q Who was it, Mr. Bender, who told you on August 27, 1963 when you paid the balance of the \$50,000, that the Assignment had been mailed to Markowitz Company and would be forthcoming?

A Mr. Mark Greenwald.

MR. MILLER: I will ask to have marked a letter August 28, 1963 relating to this matter in hearing.

THE CLERK: Blake's Exhibit No. 8 marked for identification.

(Blake's Ex. No. 8 marked for id.)

BY MR. MILLER:

Q Is this the form of Assignment that you had been discussing with Sam Greenwald relating to the Assignment of funds due, or to become due, Markowitz from Blake Construction Company?

A Mr. Max Greenwald, yes.

Q In your dealings between yourself and Markowitz Brothers, will you tell the Court what powers were assumed by Mr. Markowitz in dealing with these contracts or this construction work?

- 36 -

MR. SACKS: Objection, if the Court please. I don't think it is competent.

THE COURT: I will sustain the objection.

BY MR. MILLER:

Q Well, will you tell the Court whether in the performance of the work or the business dealings between Blake and Markowitz, matters were handled by Mr. Markowitz or anyone else with or without action by the board of directors or other officers of Blake Construction?

MR. SACKS: Objection.

THE COURT: I will sustain the objection.

BY MR. MILLER:

Q I think you were asked about some testimony, page 521 of the transcript, by Mr. Sacks; starting at page 521, the questions, I believe were as follows:

"Q Well, what was your position about getting the Assignment approved on October 28? Did you insist upon it or did you say that it did not matter?

"A When Mr. Markowitz told me he was not going to give the Assignment, I dropped the matter.

"Q But you did write him on November 1st and ask for it even though you dropped it on October 28th?

"A I didn't say I talked to him about it on October with."

- - - - -

Will you tell the Court what you meant when you

37 - said in that testimony, when Mr. Markowitz told me he was not going to give the Assignment, I dropped the matter," what were you referring to?

A There was no way I could force him to approve the Assignment that we had agreed to previously, so there was no sense in pursuing the matter. I just dropped it.

Q Did you then, or at any later time -- I am referring now to a question asked of you by Mr. Sacks -- drop the value of the Assignment? Do you recall that question?

A Yes.

Q What did you understand, "dropping the value of the Assignment" as it was phrased there, to mean?

A That I hadn't had the approval of Markowitz, so there was no Assignment.

Q Well, now, did you regard the Assignment, regardless of the approval of Markowitz, as having any effect upon your dealings with Fox-Greenwald? What was your understanding?

A Had we known that we would not get the Assignment, we would not have made the loan.

Q Prior to the time there was money paid into the Court in this present suit, which is between Fox-Greenwald and Markowitz, Mr. Bender, I think you testified at the trial, if I remember rightly, before money was paid in, was it your understanding that there was any moneys due from Markowitz to Fox-Greenwald upon which you could enforce your Assignment?

A We assumed that, yes.

Q At the time the money was paid in here?

A Yes.

Q Before that time, was there any money upon which the Assignment could be directed?

A There wasn't any money that could be attached.

Q Did you cause to be filed in this Court a suit, Civil Action Number 350-64 by Blake Construction Co., Inc. as plaintiffs versus Fox-Greenwald Sheet Metal Co., Incorporated, for the \$50,000 plus interest?

A Yes.

Q And, as far as you know, that action has been pending and is still pending?

A Yes, I assume so.

MR. MILLER: I would like to ask the Court to take judicial notice of that file, your Honor, including at least, the pleadings because they have been referred to.

THE COURT: The Court will take judicial notice of the file, which is--- Is this the file you handed up to me?

MR. MILLER: I believe it is 350-64.

THE COURT: 350-64.

BY MR. MILLER:

Q Without going into any details, Mr. Bender,

39 - in the suits pending in Baltimore, including the suits which have been partly tried by Blake and Markowitz, and including also actions by Fox-Greenwald against Markowitz, Blake and the surety companies, is it your understanding that, first of all, there has been no hearing--

THE COURT: Are you testifying, Mr. Miller?

MR. MILLER: I guess I am getting close to it. I believe I will withdraw that.

MR. SACKS: I was going to ask that.

BY MR. MILLER:

Q Have claims been made, to your knowledge, by Markowitz and by Blake as prime, that Fox-Greenwald did not properly perform or completely perform its work required of it at the National Bureau of Standards?

MR. SACKS: Objection, if the Court please.

THE COURT: Sustain the objection.

MR. MILLER: I think that's all, your Honor.

THE COURT: Is there any further Cross?

MISS COHEN: No.

MR. SACKS: May I at this time, if the Court please, interpose a motion?

THE COURT: Are you through with this witness?

MR. SACKS: Yes.

MISS COHEN: Yes.

(Witness excused.)

I CERTIFY THIS TRANSCRIPT IS TRUE AND CORRECT

*Marie Taylor*



FILED

68

FEB 28 1969

ROBERT M. SLEAKNS, Clerk

MEMORANDUM

The plaintiff, Fox-Greenwald Sheet Metal Co., Inc., obtained a judgment against the defendants, Markowitz Brothers, Inc. and Continental Casualty Co. in the sum of \$103,458.91 with interest from December 20, 1966. This judgment arose out of a contract dispute incident to a construction project for the United States Government, National Bureau of Standards, located in Gaithersburg, Maryland, for which Markowitz was a sub-contractor and Fox-Greenwald was a sub of Markowitz and was to perform certain sheet metal duct work.

During the course of the construction, Fox-Greenwald was in need of funds with which to meet payroll and other expenses and obtained a loan from Blake Construction Co., Inc., the general contractor, in the amount of \$50,000.00 and executed and delivered to Blake an assignment dated August 27, 1963.

The subcontract between Markowitz and Fox-Greenwald contained a provision as follows:

ARTICLE 22. Subcontractor agrees that he will not sublet, or assign, transfer this Contract or any part thereof, or any interest therein, or any moneys due hereunder, without first obtaining the written consent of the Contractor....

Markowitz did not give its written consent to the assignment and the principal question for determination here relates to the validity of the assignment absent said written consent.

The judgment in the amount of \$103,348.91 plus interest as mentioned above was affirmed by the United States Court of Appeals in Case No. 20,900 decided June 25, 1968 and shortly thereafter, on August 20, 1968, upon motion by the defendant Continental Casualty Co., the court entered an Order providing for payment of the amount of judgment into the registry of this court.

Pursuant to that Order, the sum of \$114,232.49 was deposited in the registry, representing the amount of the judgment plus interest. Thereafter, the sum of \$28,878.97 was ordered paid to the attorney for Fox-Greenwald, representing his fee and advanced costs, leaving a balance on deposit of \$85,353.52.

The matter now before the court relates to conflicting claims to that fund by Blake, claiming \$50,000.00 plus interest and based upon the assignment by Fox-Greenwald, and by the United States of America, claiming \$122,399.95 plus interest, for satisfaction of three Federal tax liens, notices of which were filed on February 1, 1964, April 27, 1964 and May 8, 1964, with the clerk of the court for Prince Georges County, Maryland, in which county Fox-Greenwald maintained its principal place of business.

While Blake<sup>3</sup> relies upon the assignment in support of its claim to the fund, the record is clear that Blake did nothing to enforce the terms of the assignment until August 22, 1968, more than four years after the tax liens had been filed, when Blake filed a petition for intervention and to establish a prior right to the proceeds of the judgment paid into the registry of the court.

The principal issue relates to the validity of the assignment under which Blake asserts its claim to so much of the fund required to satisfy its \$50,000.00 claim, plus accrued interest.

A second issue relates to whether Blake's claim, if valid, is barred by the Statute of Limitations, since the assignment was dated August 27, 1963 and Blake took no action to enforce its terms until the petition was filed on August 22, 1968.

It is undisputed that Fox-Greenwald did in fact execute the assignment in question, and did receive the \$50,000.00 from Blake. If this proceeding were merely to decide any claim to the fund as between Blake and Fox-Greenwald, the rights, so far as the assignment is concerned, would be with Blake, notwithstanding failure of Markowitz to execute a written consent to it.

Portuguese-American Bank of San Francisco v. Welles,

242 U.S. 7; The Dole Company v. The Aetna Casualty and Surety Company, 269 F.Supp. 72, and cases cited; Ruberoid Co. v. Glassman Construction Co., 248 Md. 97, 234 A.2d 875. These cases are authority to sustain the validity between the parties of the assignment in question. They do not sustain a priority claim against a subsequent judgment lien.

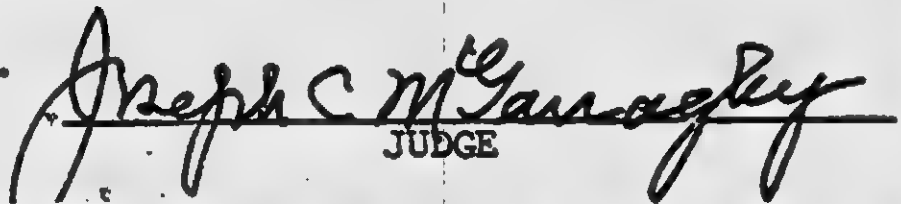
In this case, the rights of the United States have intervened by reason of the tax liens which were filed with the clerk of the court in Prince Georges County, Maryland, and the court is of the opinion that the lien of the United States is superior to the claim of Blake and must be enforced by payment from the registry of the court to the extent that such fund is available in amount.

The court is also of the opinion that the claim of Blake is barred by the Statute of Limitations, having in mind that Blake's claim is based on an instrument dated August 27, 1963 and became enforceable on October 27, 1963, but action on the assignment was not asserted by Blake until the filing of the petition herein on August 22, 1968.

Accordingly, the court will sign an Order directing payment from the registry of the court to the United States of America of the fund now on deposit in the registry.

Counsel for the United States will submit an Order in conformity herewith.

February 28, 1969

  
JUDGE

72  
J U D G M E N T

F I L E D

APR 1 1969  
ROBERT M. STEARNS, C

This action came on for hearing before the Court on the 17th day of February, 1969. The Court having heard the testimony of witnesses, considered the pleadings on file, the documentary evidence introduced, the briefs and oral argument of counsel for all parties, and having heretofore entered its memorandum decision on February 28, 1969,

IT IS HEREBY ORDERED that plaintiff Fox-Greenwald Sheet Metal Company, Inc., is indebted to the United States of America in the amount of \$112,189.45, plus interest, for taxes, all as more fully set forth in the complaint in intervention of the United States of America;

ORDERED that the claim of the United States to the fund in the Registry of the Court is entitled to priority over the claim of intervenor Blake Construction Company, Inc., based on its assignment from Fox-Greenwald Sheet Metal Company, Inc.;

ORDERED that the statute of limitations bars the claim of Blake Construction Company, Inc., to the fund in the Registry of the Court;

ORDERED that ten (10) days after the entry of this Judgment, the Clerk of the Court shall (unless an order is otherwise granted pursuant to Rule 62) pay over to the United States of America the fund now on deposit in the Registry of this Court in this action, to wit, \$85,353.52, which shall be applied on the outstanding tax liabilities adjudged against the plaintiff, Fox-Greenwald Sheet Metal Company, Inc., by the terms of this order.

Dated at Washington, D. C. this 1st day of April 1969.

*Joseph C. McLaughlin*  
Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FOX-GREENWALD SHEET METAL CO., INC.,

Plaintiff,

v.

MARKOWITZ BROTHERS, INC. and  
CONTINENTAL CASUALTY CO.,

Defendants,

and

UNITED STATES OF AMERICA,  
FRED C. SACKS, ESQ. and BLAKE  
CONSTRUCTION CO., INC.,

Intervenors.

Civil Action No. 1693-64

**E I L E D**

APR 8 1969

ROBERT M. STEARNS, Clerk

NOTICE OF APPEAL

Notice is hereby given that BLAKE CONSTRUCTION CO., INC., one of the Intervenors above-named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from an Order awarding final Judgment in the amount of \$112,189.45 in favor of Intervenor UNITED STATES OF AMERICA, on said Intervenor's complaint in intervention, said amount representing a fund which was paid into the Registry of this Court by the defendants herein. The said Order and Judgment appealed from was entered in this action by this Court on April 1, 1969.

Respectfully submitted,

DANZANSKY, DICKEY, QUINT &amp; GORDON

By

Marshall E. Miller  
Marshall E. MillerRobert D. Roadman  
Robert D. Roadman



*707 Greenwald  
an F. Greenwald*

COLLATERAL ASSIGNMENT OF PROCEEDS OF  
BUILDING CONTRACT

Assignment made August 27, 1963 by Fox-Greenwald Sheet Metal Co., Inc., a corporation organized under the laws of the State of Maryland doing business in Washington, D.C., hereinafter called "Assignor" to Blake Construction Co., Inc., a corporation organized under the laws of Delaware with offices at 1120 Connecticut Avenue, N.W., Washington 6, D.C., hereinafter called the "Assignee."

WHEREAS, the Assignor entered into an agreement, hereinafter referred to as the "construction contract", with Markowitz Bros., Inc. dated July 20, 1962 to furnish sheet metal duct work for airconditioning plant in new facilities of the National Bureau of Standards located in the vicinity of Gaithersburg, Maryland pursuant to which agreement Markowitz Bros., Inc. agreed to pay One Million and Fifty Thousand (\$1,050,000.00) Dollars to the Assignor for such work, labor and materials, and

WHEREAS, the Assignor has entered upon the performance of the construction contract and is now more than ninety per cent (90%) complete in its work thereof, and

WHEREAS, there is now due and owing under the construction contract more than Two Hundred Thousand (\$200,000.00) Dollars and there will be at least this amount owing upon the Assignor's completion thereof, and

WHEREAS, the Assignor is indebted to the Assignee in the sum of Fifty Thousand (\$50,000.00) Dollars as evidenced by a promissory note dated August 27, 1963, due on October 27, 1963,

with interest thereof at six per cent (6%) per annum, it is therefore agreed:

1. Assignment To secure the payment of such note and the interest thereon, and any note hereafter made in renewal thereof, the Assignor hereby assigns to the Assignee, its successors or assigns, all the money now due and hereafter to become due under the construction contract, together with all rights to receive such money or any part thereof.

2. Power of attorney The Assignor hereby irrevocably appoints the Assignee, its successors or assigns, its true and lawful attorney to collect and receive all such moneys, and to give receipts therefor, and to demand, sue for, and levy with respect to all such moneys, granting to the Assignee full power and authority to do and perform every act and thing whatsoever necessary as fully as the Assignor might or could do, with full power of substitution and revocation.

3. Authority for payments The Assignor shall execute and deliver to Markowitz Bros. Inc. forthwith an order directing the payment to the Assignee of all moneys due under the construction contract if payment of said note is not made on its due date.

4. Warranties The Assignor warrants that the balance now due or hereafter to become due on the construction contract exceeds Two Hundred Thousand Dollars (\$200,000.00); and that it has not made any prior assignments of any of such moneys.

IN WITNESS WHEREOF, the Assignor has signed and acknowledged this instrument in duplicate.

FOX-GREENWALD SHEET METAL  
CO. INC.

By: *May Greenwald*

Vice President

[Jurat Omitted in Printing]

FILED  
MAY 6 1969  
ROBERT M. WASHINGTON, CLERK

76

[Plaintiff's Ex. 2]

PROMISSORY NOTE

\$50,000.00

August 27, 1963

Sixty (60) days after date, for value received, the undersigned FOX-GREENWALD SHEET METAL CO., INC., a Maryland corporation, promises to pay to BLAKE CONSTRUCTION COMPANY, INC., or order, at 1120 Connecticut Avenue, N. W., Washington, D. C. the sum of Fifty Thousand Dollars (\$50,000.00) together with interest at the rate of six per cent (6%) per annum.

Attest:

FOX-GREENWALD SHEET METAL CO., INC.

[Signature]  
Secretary

By [Signature]  
Vice-President

[CORPORATE SEAL]

ENDORSEMENT AND GUARANTEE OF PAYMENT

In consideration of the making, at our request, of the loan evidenced by the above note, the undersigned hereby jointly and severally guarantee the payment of the above note at maturity or at any time thereafter, with interest; and in case of nonpayment thereof when due, suit may be brought by the holder of this note against any one or more or all of us, regardless of whether such suit has been commenced against the maker, and in any such suit the maker may be joined as a party defendant at the option of such holder. The undersigned do hereby waive demand, protest, notice of dishonor, notice of nonpayment, and we consent that the payment of this note may be extended from time to time without affecting our liability, and we waive diligence on the part of any holder hereof in collecting the above note and any defense arising out of lack of diligence in enforcing payment thereof.

Attest:

MAX GREENWALD & SONS, INC.

[Signature]  
Secretary

By [Signature]  
President

[CORPORATE SEAL]

Attest:

SAM FOX SHEET METAL CO.

[Signature]  
Secretary

By [Signature]  
President

[CORPORATE SEAL]

[Signature]  
SAM FOX, Individually

MAX GREENWALD, Individually

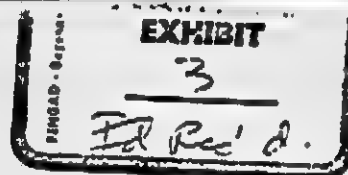
[Signature]  
PHILIP FOX, Individually

MINUTES

of

MEETING OF BOARD OF DIRECTORS

of

MAX GREENWALD AND SONS, INC.

I, Gerald Greenwald, Secretary of Max Greenwald & Sons, Inc., a corporation organized and existing under the laws of the District of Columbia, do hereby certify that the following is a true copy of the minutes of a special meeting of the Board of Directors of Max Greenwald & Sons, Inc. held August 16, 1963, and that the said minutes are in full force and effect as of this date, have not been modified and is not inconsistent with any of the provisions of the By-Laws or the Charter of said corporation.

A special meeting of the Board of Directors was called by directors Max Greenwald and Gerald Greenwald. The meeting was held at the offices of the corporation, at 5101 Creston Street, Tuxedo, Maryland at 1 P.M. Attending were: Max Greenwald, Gerald Greenwald and Henry Greenwald, constituting a majority of the Board of Directors of the company.

Upon motion duly made, seconded, and carried, it was

RESOLVED, to dispense with the reading of the minutes of the last meeting of the Board of Directors.

Upon motion duly made, seconded, and carried, it was

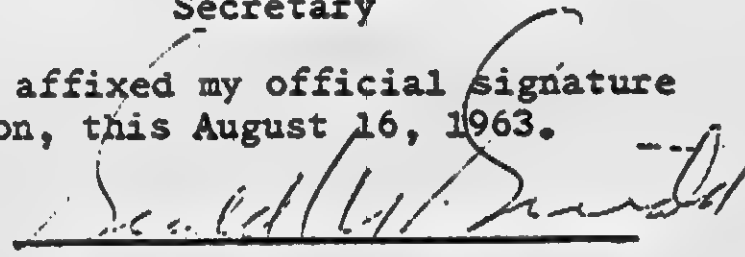
RESOLVED, that Max Greenwald, on behalf of the corporation, be authorized to execute as endorser, guarantor, or indemnitor of any or all negotiable instruments which are primarily for the benefit and assistance of Fox-Greenwald Sheet Metal Co., Inc. in their securing a loan in the sum of Fifty Thousand (\$50,000) Dollars repayable in a period of 60 days at 6%. The authority of the corporation extended to Max Greenwald to bind the corporation having been determined as being beneficial to the present and future contractual relations between Fox-Greenwald Sheet Metal Co., Inc. and Max Greenwald & Sons, Inc.

There being no further business to come before the board, the meeting was adjourned.

  
Secretary

IN WITNESS WHEREOF, I have affixed my official signature and the seal of the said corporation, this August 16, 1963.

CORPORATE SEAL



AIR CONDITIONING

VENTILATING • STAINLESS STEEL • COM

78

COMMERCIAL AND INDUSTRIAL SHEET METAL WORK

PHONE 388-0988

4200 KEARNEY STREET

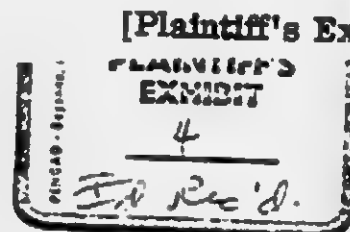
DENVER 16, COLORADO



FILED  
MAY 6 1969  
RUBEN M. GILBERT, CLERK

MINUTES

MEETING OF BOARD OF DIRECTORS



I, Philip M. Fox, Vice President of Sam Fox Sheet Metal Company, a corporation organized and existing under the laws of the State of Colorado, do hereby certify that the following is a true copy of the minutes of a special meeting of the Board of Directors of Sam Fox Sheet Metal Company held August 16, 1963, and that the said minutes are in full force and effect as of this date, have not been modified and is not inconsistent with any of the provisions of the By-Laws or the Charter of said corporation.

A special meeting of the Board of Directors was called by directors Samuel E. Fox and Philip M. Fox. The meeting was held at the offices of the corporation, at 4200 Kearney Street, Denver, Colorado at 1 P.M. Attending were: Samuel E. Fox and Philip M. Fox, constituting a majority of the Board of Directors of the company.


Upon motion duly made, seconded, and carried, it was

RESOLVED, to dispense with the reading of the minutes of the last meeting of the Board of Directors.

Upon motion duly made, seconded, and carried, it was

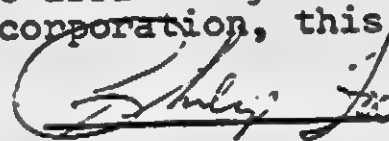
RESOLVED, that Samuel E. Fox, on behalf of the corporation, be authorized to execute as endorser, guarantor, or indemnitor of any or all negotiable instruments which are primarily for the benefit and assistance of Sam Fox Sheet Metal Company in their securing a loan in the sum of Fifty Thousand (\$50,000) Dollars repayable in a period of 60 days at 6%. The authority of the corporation extended to Samuel E. Fox to bind the corporation having been determined as being beneficial to the present and future contractual relations between Sam Fox Sheet Metal Company and Fox-Greenwald Sheet Metal Co., Inc.

There being no further business to come before the board, the meeting was adjourned.

  
Vice President

IN WITNESS WHEREOF, I have affixed my official signature and the seal of the said corporation, this August 16, 1963

CORPORATE SEAL









FILED

MAY 6 1969

UBERT M. JILKINS, CLERK

[Plaintiff's Ex. 5b]



For Report only  
 Fox-Greenwald  
 Sheet Metal Co. Inc  
 by ~~Matthew~~ all  
 Vice President

FOR DEPOSIT TO THE CREDIT  
 OF WITHIN NAMED PAYEE  
 The First National Bank  
 OF WASHINGTON  
 WASHINGTON, D.C.

FILED

MAY 6 1969

81

MINUTES

[Plaintiff's Ex. 6]

JOHN M. SILVERMAN, CLERK

of



MEETING OF BOARD OF DIRECTORS

of

FOX-GREENWALD SHEET METAL CO., INC.

I, Henry Greenwald, Secretary of Fox-Greenwald Sheet Metal Co., Inc., a corporation organized and existing under

the laws of the State of Maryland, do hereby certify that the following is a true copy of the minutes of a special meeting of the Board of Directors of Fox-Greenwald Sheet Metal Co., Inc. held August 16, 1963, and that the said minutes are in full force and effect as of this date, have not been modified and is not inconsistent with any of the provisions of the By-Laws or the Charter of said corporation.

Pursuant to the authority of Section 4 (a) of the corporation's by-laws, a special meeting of the board of directors was called by directors Max Greenwald and Henry Greenwald. The meeting was held at the offices of the corporation, 5101 Creston Street, Tuxedo, Maryland at 11 A.M. August 16, 1963. Attending were: Philip M. Fox, Max Greenwald, Henry Greenwald and Gerald Greenwald, constituting a majority of the total number of directors.

Upon motion duly made, seconded, and carried, it was

RESOLVED, to dispense with the reading of the minutes of the last meeting of the Board of Directors.

Upon motion duly made, seconded, and carried, it was

RESOLVED, that Max Greenwald on behalf of the corporation be authorized to negotiate and contract for a loan in the sum of Fifty Thousand (\$50,000) Dollars and that Max Greenwald be authorized to execute on behalf of the corporation, a promissory note and all other negotiable instruments which may be required as collateral for the repayment of said note, which loan shall be repayable in a period of 60 days, bearing interest not in excess of 6%.

There being no further business to come before the board, the meeting was adjourned.

Henry Greenwald  
Secretary

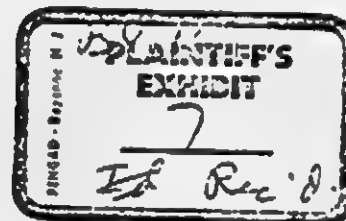
IN WITNESS WHEREOF, I have affixed my official signature and the seal of the said corporation, this 16th day of August, 1963

55

CORPORATE SEAL

Henry Greenwald  
Secretary

11E-139



1 November 1963

FILED

MAY 6 1969

ROBERT M. JILKINS, CLERK

Markowitz Bros., Inc.  
5600 N. E. Fourth Avenue  
Miami 37, Florida

Re: National Bureau of Standards,  
Phase II  
Gaithersburg, Maryland  
Contract No. GS-R3-3-8695

Gentlemen:

After reviewing the situation at Gaithersburg, Phase II, we have come to the conclusion that you will have to furnish this office with the following information:

1. A copy of all your purchase orders and contracts showing the amounts of each and what has been paid to date of 28 October 1963.
2. A copy of all your billings from all of the suppliers and subcontractors through 15 October 1963.

In order to expedite your payment on your requisition, which by the way, was just approved today, we suggest that you have all this information in this office no later than 15 November 1963.

Mr. Ben Markowitz also agreed to furnish certain other information.

We also request, at this time, the approval of the assignment made by Fox--Greenwald Company, as this has been dragging on for the past two months.

Very truly yours,

BLAKE CONSTRUCTION COMPANY, INC.

Stanley S. Bander

~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~

X-GREENWALD SHEET METAL CO., INC.

5101 CRESTON STREET  
TUXEDO, MD.  
SPRUE 3-2950SHEET METAL CONTRACTORS4200 KEARNEY STREET  
DENVER 16, COLORADO  
DUDLEY C-0981

August 23, 1963

FILED  
MAY 6 1969

RUBEN M. GILBERT, CLERK

Kovitz Brothers, Inc.  
28 Auburn Avenue  
Bethesda 14, Maryland

Attention:

herewith direct any and all payments due us under our subcontract with you dated July 20, 1962, to furnish sheet metal duct work for the air-conditioning unit in the new facilities of National Bureau of Standards, to Blake Construction Co., Inc., in the event that our note in the amount of \$50,000.00 due on October 27, 1965, with interest at 6%, is unpaid at that time.

Very truly yours,

X-GREENWALD SHEET METAL CO., INC.

 A handwritten signature in cursive script, appearing to read "Max Greenwald".
   
Max Greenwald, Vice President

Said

Accepted:

At:

agree to the above assignment of funds and we authorize Blake Construction Co., Inc. to withhold from any payments due us, a sum as much to pay the above described note with interest of any sum due us under our subcontract with Blake Construction Co., Inc.

DEFENDANT'S EXHIBIT NO. 6

CASE NO.

16235-16236 Civil

ADMITTED IN EVIDENCE

MAY 19 1966

BEST COPY AVAILABLE

from the original bound volume

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

FOX-GREENWALD SHEET METAL CO., INC.,

Plaintiff

v.

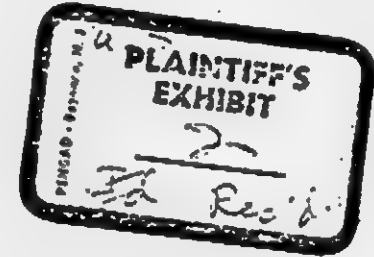
MARKOWITZ BROTHERS, INC., and  
CONTINENTAL CASUALTY CO.,

Defendants

and

UNITED STATES OF AMERICA,  
FRED C. SACKS, ESQ., and BLAKE  
CONSTRUCTION CO., INC.,

Intervenors



CIVIL ACTION NO. 1693-64

STIPULATION

It is hereby stipulated and agreed by and between plaintiff Fox-Greenwald Sheet Metal Company, Inc. (taxpayer), and the intervenor United States of America, by their respective attorneys, that the United States has made assessments against the taxpayer on which an unpaid balance remains of \$112,189.45, plus accrued interest, and that notice of and demand for payment of these assessments were made upon the taxpayer, all as more fully set forth in Paragraph IV of the United States' Complaint in Intervention.

DATED: 1.11.1969

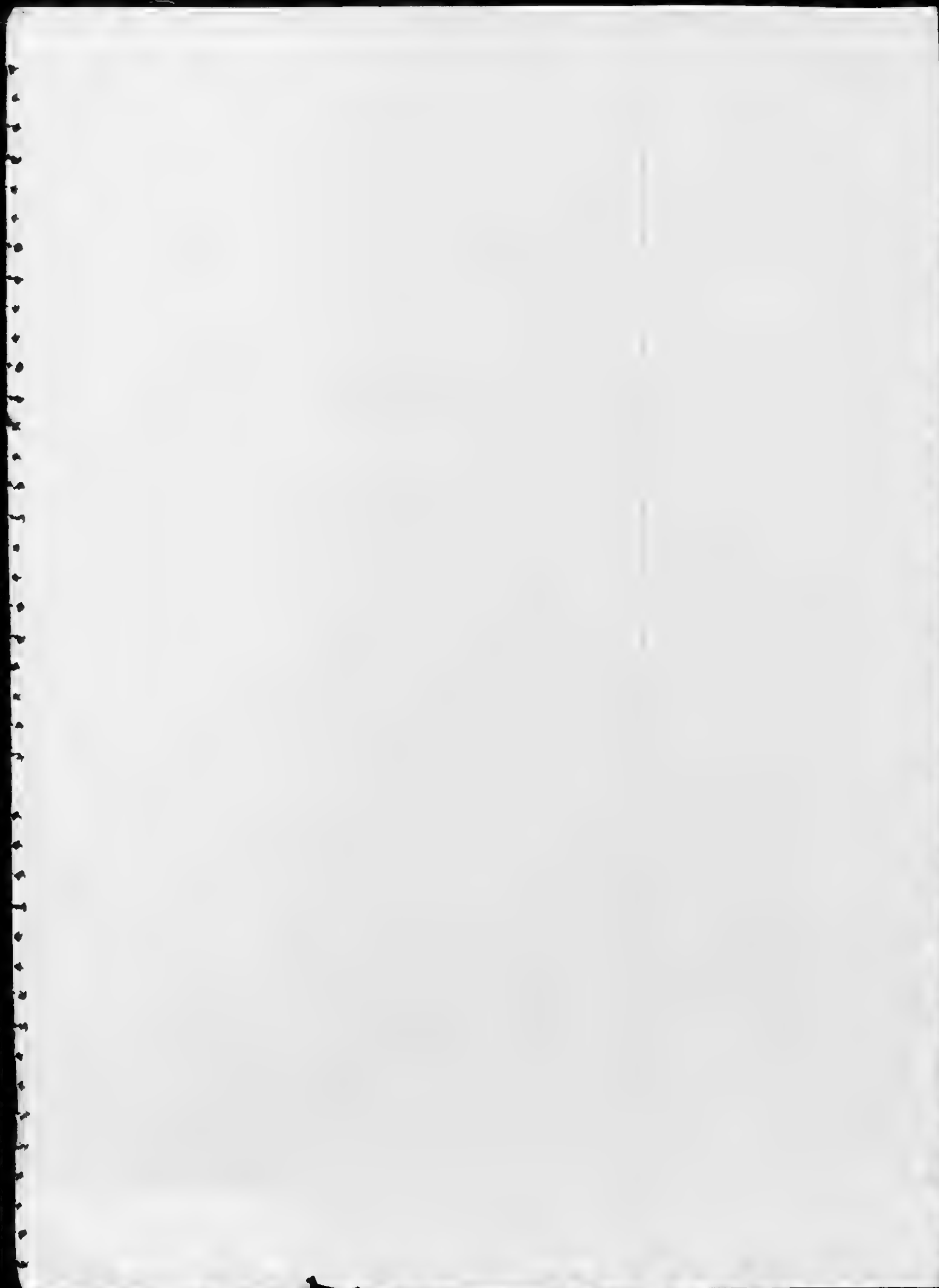
Sara Jane M. Cohen  
SARA-JANE M. COHEN  
Attorney, General Litigation Section

Fred C. Sacks  
FRED C. SACKS  
Attorney for Fox-Greenwald  
Sheet Metal Company, Inc.

Johnnie M. Walters  
JOHNNIE M. WALTERS  
Assistant Attorney General  
Tax Division

Fred B. Ucast  
FRED B. UCAST  
Chief, General Litigation Section

DAVID G. BRESS  
United States Attorney  
of Counsel





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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 23,160

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FOX-GREENWALD SHEET METAL CO., INC.

v.

MARKOWITZ BROTHERS, INC.  
CONTINENTAL CASUALTY CO.  
and  
BLAKE CONSTRUCTION CO., INC.  
Appellant,  
UNITED STATES OF AMERICA,  
Appellee

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

BRIEF FOR APPELLANT  
United States Court of Appeals  
for the District of Columbia Circuit

FILED SEP 3 1969

MARSHALL E. MILLER  
ROBERT D. ROADMAN  
1120 Connecticut Avenue, N.W.  
Washington, D.C. 20036

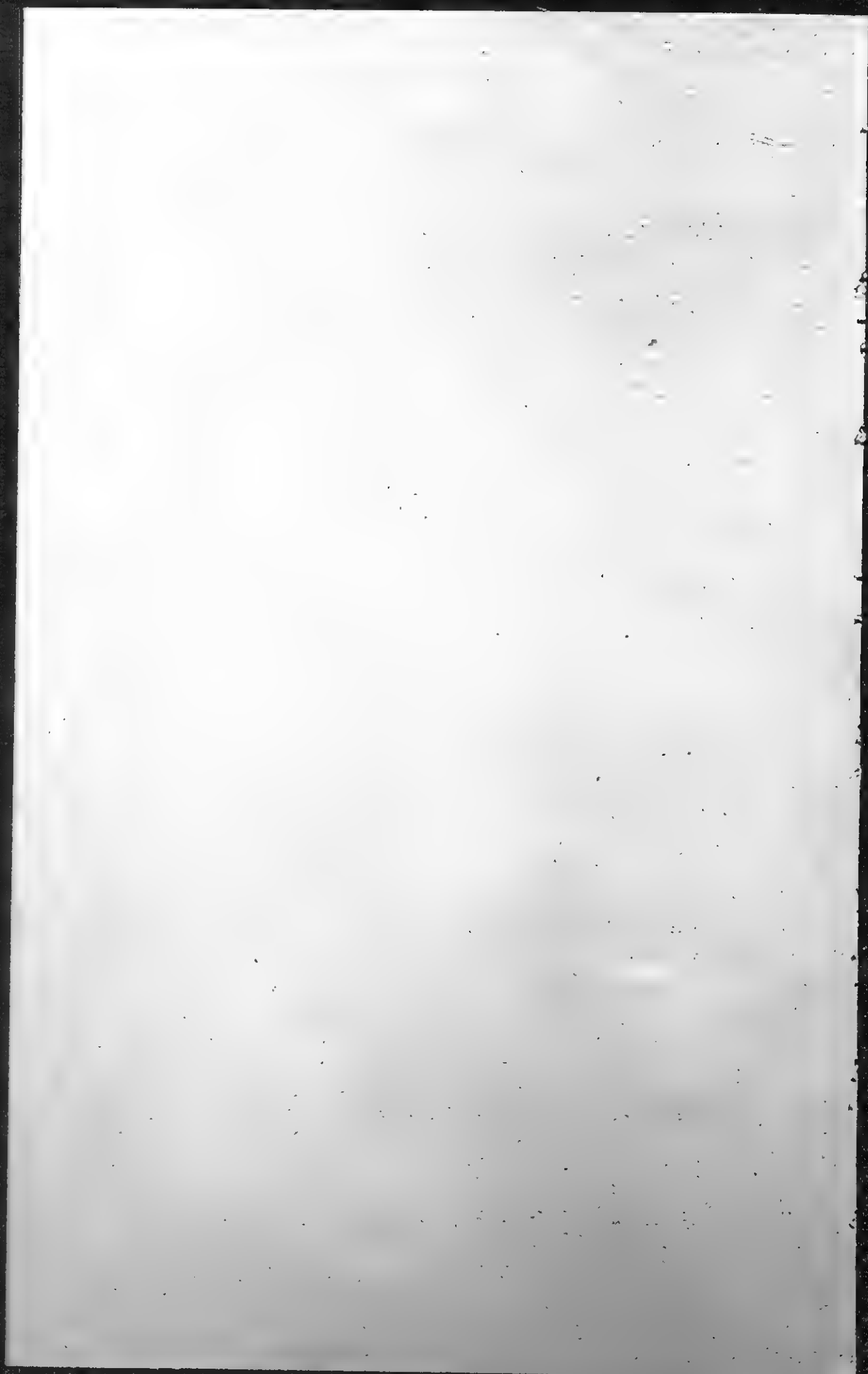
*Nathan J. Paulson*  
Of Counsel

CLERK

Attorneys for Appellant

DANZANSKY, DICKEY, QUINT & GORDON  
1120 Connecticut Avenue, N. W.  
Washington, D. C. 20036





(i)

## TABLE OF CONTENTS

	<u>Page</u>
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF ISSUES PRESENTED .....	2
REFERENCES TO RULINGS.....	2
STATEMENT OF THE CASE .....	3
ARGUMENT.....	5
I. The Assignment Running from Fox-Greenwald to Blake Is Valid and Binding upon the United States.....	5
II. The Statute of Limitations Is Not Applicable to Blake's Intervention.....	8
CONCLUSION .....	10

## TABLE OF AUTHORITIES

### CASES:

*Dole Company v. Aetna Casualty and Surety Company, 269 F. Supp. 72 (D.C. Maine, 1967).....	6, 7
*Portuguese-American Bank of San Francisco v. Welles, 242 U.S. 7, 37 S.Ct. 3 (1916).....	6, 7
*Ruberoid Co. v. Glassman Construction Co., 248 Md. 97, 234 A.2d 875 (1967).....	6, 7

### STATUTES:

28 U.S.C. § 1291 .....	2
Article 8, § 1, Maryland Code (1957 Edition) .....	7

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\*Cases chiefly relied on.



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 23,160

---

FOX-GREENWALD SHEET METAL CO., INC.

v.

MARKOWITZ BROTHERS, INC.  
CONTINENTAL CASUALTY CO.  
and  
BLAKE CONSTRUCTION CO., INC.  
Appellant,  
UNITED STATES OF AMERICA,  
Appellee

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

BRIEF FOR APPELLANT

---

JURISDICTIONAL STATEMENT

Appellant, BLAKE CONSTRUCTION CO., INC. (hereinafter sometimes referred to as "BLAKE"), and appellee, UNITED STATES OF AMERICA, both intervened in this action in the United States District Court for the District of Columbia pursuant to Rule 24 of the Federal Rules of Civil Procedure, claiming priority to one another in rights to a fund paid into the registry of the District Court by defendant

after final judgment was entered in favor of plaintiff FOX-GREENWALD SHEET METAL CO., INC. (hereinafter sometimes referred to as "FOX-GREENWALD"). Final judgment in favor of intervenor UNITED STATES OF AMERICA was entered by the Court on April 1, 1969. This Court's jurisdiction on appeal is based on 28 U.S.C. § 1291.

### STATEMENT OF ISSUES PRESENTED

1. The Court below erred in finding that an assignment valid as between plaintiff FOX-GREENWALD and intervenor BLAKE was not valid and binding upon the UNITED STATES.

2. The Court below erred in finding that an assignment valid as between plaintiff FOX-GREENWALD and intervenor BLAKE was not prior to and superior to tax liens filed by intervenor UNITED STATES subsequent to the date of the assignment.

3. The Court below erred in failing to find that intervenor UNITED STATES, as a tax lienor of the plaintiff FOX-GREENWALD, stood in no better position than the plaintiff so that the assignment running from FOX-GREENWALD to BLAKE, which was valid and binding upon FOX-GREENWALD, would also be valid as to the UNITED STATES.

4. The Court erred in holding that the assignment running from FOX-GREENWALD to BLAKE was invalid and barred by the Statute of Limitations.

This case was previously before the Court as *Markowitz Bros., Inc. and Continental Casualty Company v. Fox-Greenwald Sheet Metal Company, Inc.*, Appeal No. 20900, on defendant's appeal from judgment in favor of plaintiff.

### REFERENCES TO RULINGS

The memorandum opinion of United States District Judge Joseph P. McGarraghy, which forms the basis of the judgment herein appealed from, was issued on February 28, 1969. It appears in the Joint Appendix at pages 68-71.

## STATEMENT OF THE CASE

This case originally involved a suit by FOX-GREENWALD against MARKOWITZ BROS., INC. (hereinafter sometimes referred to as "MARKOWITZ" and CONTINENTAL CASUALTY COMPANY (hereinafter sometimes referred to as "CONTINENTAL" for money due for unpaid requisitions arising out of work allegedly performed by FOX-GREENWALD under a sub-subcontract on a construction project. Upon trial, the jury returned a verdict in favor of FOX-GREENWALD for \$103,458.91, from which defendants, MARKOWITZ and CONTINENTAL, appealed. The verdict and resultant judgment in favor of FOX-GREENWALD was affirmed on appeal on June 25, 1968.

On July 30, 1968, defendant, CONTINENTAL, filed in the United States District Court a petition for leave to pay the judgment into the registry of the Court [J.A. 5]. The purpose of CONTINENTAL's so petitioning the Court was that it had received notice from various creditors of FOX-GREENWALD, including intervenor BLAKE and intervenor UNITED STATES, claiming the judgment proceeds [J.A. 6].

On August 1, 1968, BLAKE filed a motion for leave to intervene claiming priority to the fund paid into the registry of the Court based upon a \$50,000 note secured by an assignment of proceeds due or to become due to FOX-GREENWALD from MARKOWITZ under their construction sub-subcontract [J.A. 10; J.A. 74-75; J.A. 76]. The United States District Court for the District of Columbia entered an order granting BLAKE leave to intervene on August 21, 1968 [J.A. 16]. Thereafter, BLAKE filed its petition in intervention [J.A. 17] claiming priority to \$50,000 plus interest on the fund then in the registry of the Court.

The UNITED STATES filed a motion for leave to intervene on November 1, 1968, claiming an interest in the fund by reason of federal tax liens outstanding against FOX-GREENWALD [J.A. 14]. On November 14, 1968, an order was entered by the District Court granting the UNITED STATES leave to intervene [J.A. 24], and, subsequently, on November 22, 1968, the UNITED STATES filed a complaint

in intervention claiming priority to the fund then held in the registry of the Court [J.A. 25].

Intervenor BLAKE was the prime contractor for construction of the National Bureau of Standards building in Gaithersburg, Maryland [J.A. 31]. MARKOWITZ was BLAKE's mechanical subcontractor [J.A. 31] and FOX-GREENWALD was the sheet metal sub-subcontractor under written agreement with MARKOWITZ as subcontractor [J.A. 32]. Early in August, 1963, Max Greenwald of FOX-GREENWALD approached representatives of BLAKE seeking to borrow \$50,000 in order to meet their payrolls inasmuch as MARKOWITZ was cutting FOX-GREENWALD's requisitions [J.A. 34]. BLAKE agreed to lend \$50,000 to FOX-GREENWALD for the purpose of permitting the latter to meet payrolls [J.A. 34] if FOX-GREENWALD would assign to BLAKE as security all amounts due or to become due FOX-GREENWALD from MARKOWITZ, pursuant to their sub-subcontract [J.A. 34]. Secondly, BLAKE sought approval of MARKOWITZ of the assignment in light of the fact that the sub-subcontract between MARKOWITZ and FOX-GREENWALD contained a non-assignability clause in the absence of written consent by MARKOWITZ [J.A. 34-37]. At that time Mr. Stanley Bender, Treasurer of BLAKE CONSTRUCTION CO., INC. [J.A. 30] had a telephone conversation with Mr. Ben Markowitz, President of MARKOWITZ [J.A. 31; J.A. 58], wherein Mr. Bender was informed by Mr. Markowitz that MARKOWITZ would have no objection to such as assignment running from FOX-GREENWALD to BLAKE [J.A. 34-37]. On the strength of Mr. Markowitz's representations and on his promise that written consent would be forthcoming, BLAKE loaned FOX-GREENWALD \$50,000 [J.A. 34-37; J.A. 74-83]. This loan was evidenced by a promissory note dated August 27, 1963 [J.A. 39; J.A. 76] and was secured by a collateral assignment of the same date whereunder FOX-GREENWALD assigned all proceeds then due or to become due under its contract with MARKOWITZ to BLAKE as security for repayment of the \$50,000 [J.A. 37-38; J.A. 75].



After BLAKE had made the loan and accepted the assignment as security, Mr. Ben Markowitz refused to furnish written consent to the assignment [J.A. 41-42; J.A. 82]. The promissory note, secured by the assignment, remains unpaid with only a small portion of interest in the amount of \$500 having been paid to BLAKE in early November, 1963 [J.A. 43]. In 1964, BLAKE filed an action against FOX-GREENWALD in the United States District Court for the District of Columbia seeking to recover the \$50,000 debt evidenced by said promissory note [J.A. 66].

Intervenor UNITED STATES, in the latter part of 1963, and subsequent to the note and assignment, made certain assessments against FOX-GREENWALD for unpaid taxes, the dates and amounts of which are more fully set forth in the complaint in intervention of the UNITED STATES [J.A. 25]. Tax liens were filed in various counties in Maryland in the amount of tax liability owed to the UNITED STATES by FOX-GREENWALD commencing February 17, 1964 [J.A. 27]. It is on the basis of these tax liens that intervenor UNITED STATES claims priority to the fund paid into the registry of the Court [J.A. 27].

It must be noted that the UNITED STATES concedes that if the assignment running from FOX-GREENWALD to BLAKE is valid, the assignment, as a security interest, must be given priority over the subsequently filed federal tax liens [Tr. 63].

## ARGUMENT

### I. The Assignment Running from FOX-GREENWALD to BLAKE Is Valid and Binding upon the UNITED STATES.

In its memorandum opinion dated February 28, 1969 [J.A. 68], the trial court held that while the assignment of proceeds by FOX-GREENWALD to BLAKE was valid as between the assignor and assignee, it was not binding upon a third party, namely, the UNITED STATES, by reason of the fact that MARKOWITZ refused to execute a written consent to said assignment as was required pursuant to the sub-

contract between MARKOWITZ and FOX-GREENWALD. To support its holding, the trial court relied upon *Portuguese-American Bank of San Francisco v. Welles*, 242 U.S. 7, 37 S.Ct. 3 (1916); *Dole Company v. Aetna Casualty and Surety Company*, 269 F. Supp. 72 (D.C. Maine, 1967) and *Ruberoid Co. v. Glassman Construction Co.*, 248 Md. 97, 234 A.2d 875 (1967).

It is submitted that these cases do not support the trial court's holding. Rather, the holdings in the cited cases are wholly consistent with the contention of the intervenor BLAKE that the assignment in question was not only valid and binding as to FOX-GREENWALD as assignor and BLAKE as assignee, but also must be binding upon the UNITED STATES. In *Portuguese-American Bank of San Francisco v. Welles*, *supra*, a municipality, as owner of the construction work, owed an amount due under the construction contract to the prime contractor. A subcontractor brought suit claiming a lien on the said amount due. The Portuguese-American Bank of San Francisco asserted a claim to the sum due, grounded upon an assignment of the proceeds of the contract to it by the prime contractor to secure certain loans. The assignment was attacked as being invalid because of the presence of a nonassignability clause in the contract. The Supreme Court held that the assignment was valid and binding, not only as between the prime contractor and the bank, which occupied positions as assignor and assignee, but also was valid and binding as to the third party subcontractor, so as to preclude the subcontractor from entitlement to the fund. The Court stated as follows (at 37 S.Ct. 4):

"The assignability of a debt incurred under a contract like the present sometimes is sustained on the ground that the provision against assignment is inserted only for the benefit of the City. Whether that form of expression is accurate or merely is an indirect recognition of the principle that we have stated hardly is material here. It is enough to say that we are opinioned that, upon the facts stated,

the assignment was not absolutely void, that therefore the Bank got a title prior to that of Welles and consequently that the decree must be reversed."

See to the same effect, *Dole Company v. Aetna Casualty and Surety Company*, *supra*, and *Ruberoid Co. v. Glassman Construction Co.*, *supra*.

In light of the holdings in the cases cited above, and particularly in view of the Supreme Court's reasoning in *Portuguese-American Bank of San Francisco v. Welles*, *supra*, it is submitted that the trial court erred in holding that the assignment of proceeds was valid only as between FOX-GREENWALD, the assignor, and BLAKE, the assignee. The situation in the instant case is precisely the same as the situation that existed in the *Portuguese-American Bank* case. The assignment from FOX-GREENWALD to BLAKE of proceeds due or to become due pursuant to a construction subcontract between MARKOWITZ and FOX-GREENWALD is valid and must be binding upon all persons or parties *other than MARKOWITZ*, which refused written consent to the assignment. This becomes more obvious when it is realized that the intervenor UNITED STATES, if it stands in the shoes of any party, must stand in the shoes of its taxpayer, FOX-GREENWALD. Its rights can be no greater than the rights of its taxpayer. This must be particularly true in view of the fact that as early as February, 1964, the Internal Revenue Service was made aware of the existence of the assignment here in question [J.A. 49].

Further, the validity of the assignment for purposes relevant to this matter is supported by the Maryland statute which was in force at the time the assignment was made and which is controlling as to questions presented herein. Article 8, Section 1, of the Annotated Maryland Code (1957 Edition), provided that all written assignments of amounts due or to become due on contracts were valid and legal and passed title to the assignee to amounts due or to become due on such contracts, without the necessity of notice to the debtor, "and the transfer of title shall take

effect and *be valid and enforceable against all persons as of the date thereof.*" [Emphasis supplied.]

As has been noted above, the UNITED STATES has conceded that if the assignment of proceeds to BLAKE is a valid assignment, such assignment must be accorded priority over the tax liens of the UNITED STATES. In view of the above discussion, appellant submits that the validity of the assignment, and hence its priority over the claim by intervenor UNITED STATES is evident.

## II. The Statute of Limitations Is Not Applicable to BLAKE's Intervention.

The trial court held that BLAKE's claim in intervention based upon the assignment here in question was barred by the Statute of Limitations [J.A. 71; J.A. 72]. It is submitted, however, that there is no Statute of Limitations involved in intervenor BLAKE's assertion of a right by virtue of its assignment to the proceeds of judgment paid into the registry of the Court. In August, 1963, there was an admitted indebtedness from FOX-GREENWALD to BLAKE in the amount of \$50,000 due and payable 60 days thereafter, the security being a valid written assignment. Within three years thereafter, in 1964, BLAKE filed suit in the United States District Court for the District of Columbia in Civil Action No. 350-64 against FOX-GREENWALD upon such indebtedness. The filing of that suit tolled the running of the Statute of Limitations upon the debt. That is the only Statute of Limitations here involved. BLAKE's position in this regard is two-fold.

First, BLAKE's right to an assignment of moneys paid to FOX-GREENWALD by MARKOWITZ did not ripen into action until the moneys involved were paid into court by MARKOWITZ. Prior to that time, there were no funds upon which such assignment could attach. The right to such funds was established by the written assignment in 1963 and was made known both to MARKOWITZ and to the UNITED STATES OF AMERICA at that time, but there was no breach

of such right until the existence of the fund in question. It is hornbook law that the Statute of Limitations does not begin to run until a cause of action arises. In 1963, 1964, and 1965, there was no cause of action for breach of the assignment, because there had been no breach of the assignment. MARKOWITZ had not breached the assignment because it had not given its written consent thereto. This is no solace to the Government because the Government has no rights flowing from those of MARKOWITZ, with whom it has no privity of contract. There was no breach of the assignment to FOX-GREENWALD because its right to perform the sheet metal subcontract had been terminated by MARKOWITZ in February, 1964. FOX-GREENWALD had received no money from MARKOWITZ to which the assignment could attach and there resulted the instant litigation as to the rights of the parties. It was not until the judgment in question was entered and sustained on appeal that there was a fund in the hands of FOX-GREENWALD as assignor to which BLAKE could assert a right of assignee. Obviously, the intervention in the instant action by BLAKE asserting its right to such assigned funds was timely.

Secondly, BLAKE's intervention herein is based upon an admitted debt of \$50,000 evidenced by a promissory note. The only purpose for which BLAKE asserts the assignment is as evidence of a security interest for the repayment of such debt. It bases no cause of action upon the assignment. Rather, it asserts that FOX-GREENWALD owes BLAKE \$50,000. In order to show priority of its right to the fund now held with the registry of the Court, BLAKE must have a security interest superior to that of the UNITED STATES. It is for the purpose of showing such security interest that the assignment is a part of this case. The assignment is evidence of a security interest and not the basis for a cause of action by BLAKE against FOX-GREENWALD. It is difficult to imagine how the Statute of Limitations could run on a piece of documentary evidence, when in fact any cause of action asserted by BLAKE against FOX-GREENWALD

is based solely on an indebtedness as set forth in a promissory note and upon which the Statute of Limitations was admittedly tolled by filing the suit in 1964.

In view of these facts, it becomes clear that the trial court erred in holding that BLAKE's right to priority was barred by the Statute of Limitations. It is manifest that the Statute of Limitations as asserted by the UNITED STATES, and as discussed by the trial court, has no application to BLAKE's intervention claim in the instant cause.

#### CONCLUSION

For all of the above reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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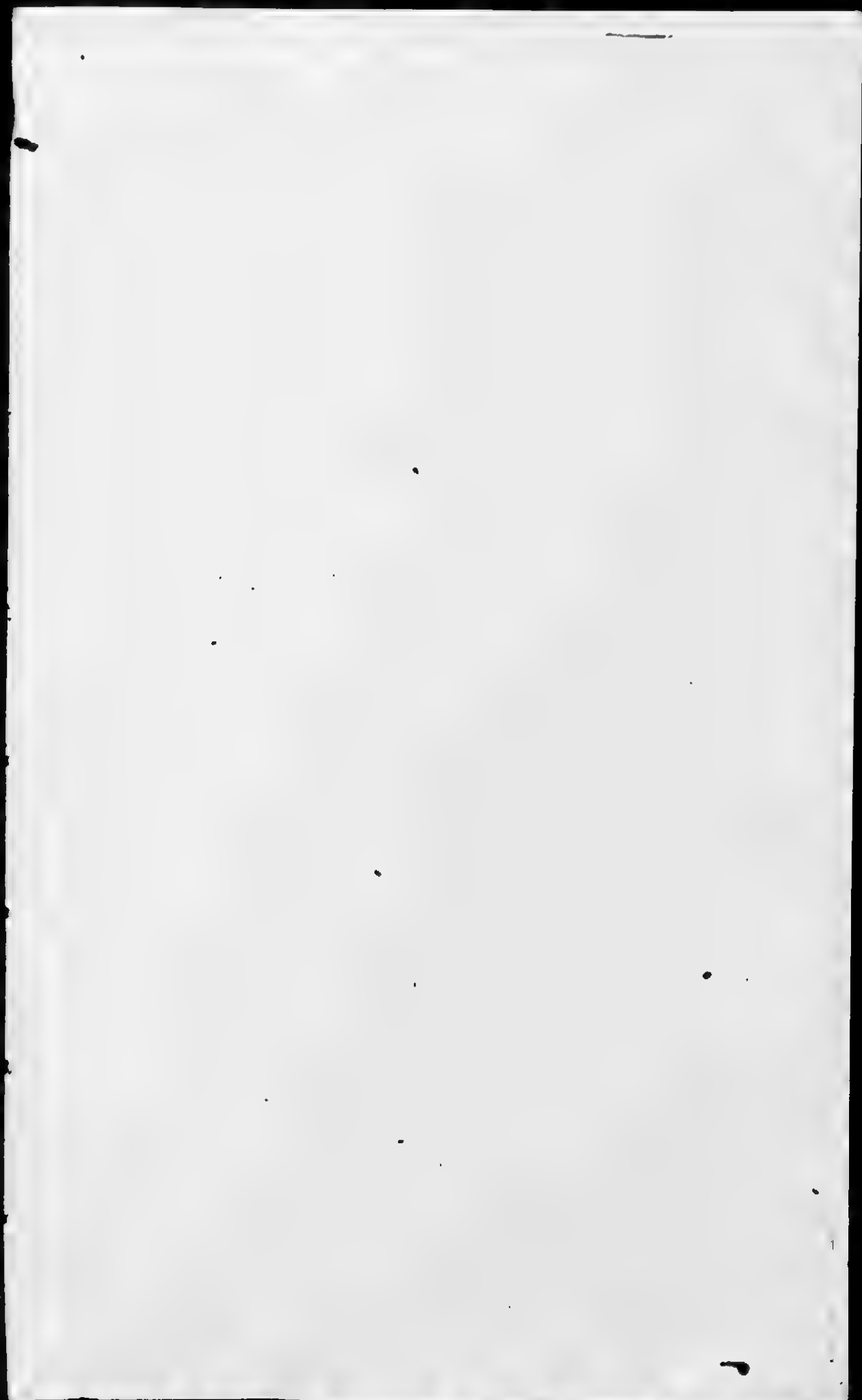
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BRIEF FOR THE APPELLEE

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 23160

FOX-GREENWALD SHEET METAL CO., INC.

v.

MARKOWITZ BROTHERS, INC.; CONTINENTAL CASUALTY  
CO. AND BLAKE CONSTRUCTION CO., INC., APPELLANT;  
UNITED STATES OF AMERICA, APPELLEE

---

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

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United States Court of Appeals

for the District of Columbia Circuit

FILED OCT 24 1959

*Nathan J. Paulson*  
CLERK



## TABLE OF CONTENTS

	Page
Statement of the issues presented.....	1
Reference to rulings.....	2
Statement of the case.....	2
Summary of argument.....	6
<b>Argument:</b>	
The District Court correctly determined that the Government's tax liens against taxpayer primed a \$50,000 claim asserted by Blake Construction Company for the reasons that (1) Blake's claim was unsecured, its security resting on an invalid assignment, and (2) even if valid, Blake's assignment was barred by the statute of limitations.....	8
A. Introduction.....	8
B. Taxpayer's assignment of contract funds to Blake is invalid for failure to obtain prior written consent to the assignment from Markowitz Brothers as required in its contract.....	9
C. Blake's assignment, even if valid, is barred by the statute of limitations.....	14
Conclusion.....	17
Appendix.....	19

### CITATIONS

<b>Cases:</b>	
<i>Andrew v. Meyerdirck</i> , 87 Md. 511, 40 Atl. 173.....	10
<i>Bimestejer v. Bimestejer</i> , 205 Md. 541, 109 A. 2d 768..	10
<i>Bitterman v. Louisville &amp; Nashville R.R.</i> , 207 U.S. 205.....	14
<i>Condol v. Baltimore &amp; Ohio R.R.</i> , 91 U.S. App. D.C. 255, 199 F. 2d 400.....	16
<i>Dole Co. v. Aetna Casualty and Surety Co.</i> , 269 F. Supp. 72.....	12
<i>Gagnon v. Wright</i> , 200 A. 2d 196.....	9
<i>King v. Udall</i> , 266 F. Supp. 747.....	16

(1)

## Cases—Continued

<i>Markowitz Bros. v. Foz-Greenwald Sheet Metal Co.</i> , 399 F. 2d 588 (C.A.D.C.).....	Page 4
<i>Martin v. National Surety Co.</i> , 300 U.S. 588.....	14
* <i>Michaelson v. Sokolove</i> , 169 Md. 529, 182 Atl. 458....	10
<i>Nunnally v. Wilder</i> , 117 U.S. App. D.C. 377, 330 F. 2d 843.....	16
<i>Portuguese-American Bank v. Welles</i> , 242 U.S. 7.....	13
<i>Ruberoid Co. v. Glassman</i> , 248 Md. 97, 234 A. 2d 875..	12
<i>United States v. Janowitz</i> , 257 U.S. 42.....	14
<i>Wharton v. Jones</i> , 285 F. Supp. 634.....	16
<i>Wolbert v. Rief</i> , 194 Md. 642, 71 A. 2d 761.....	10

## Statutes:

Annotated Code of Maryland, 1951:	
Art. 8, Sec. 1.....	20
Art. 95B, Sec. 10-101—10-102.....	9
D.C. Code, Sec. 12-301(7), (8).....	14
Internal Revenue Code of 1954:	
Sec. 6321 (26 U.S.C. 1964 ed., Sec. 6321).....	19
Sec. 6322 (26 U.S.C. 1964 ed., Sec. 6322).....	19
Sec. 6323 (26 U.S.C. 1964 ed., Sec. 6323).....	20
Uniform Commercial Code.....	9

## Miscellaneous:

Comment, 26 Yale L.J. 304 (1917).....	13
4 Corbin on Contracts, Sec. 873.....	14
3 Williston on Contracts, Sec. 422.....	14

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\* Cases or authorities chiefly relied upon are marked by asterisks.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 23160

FOX-GREENWALD SHEET METAL CO., INC.

v.

MARKOWITZ BROTHERS, INC.; CONTINENTAL CASUALTY  
CO. AND BLAKE CONSTRUCTION CO., INC., APPELLANT;  
UNITED STATES OF AMERICA, APPELLEE

---

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

## BRIEF FOR THE APPELLEE

---

### STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court correctly determined that the Government's tax liens against taxpayer primed a \$50,000 claim asserted by the Blake Construction Company under Section 6323(a) of the Internal Revenue Code of 1954 for the reason that Blake's claim was unsecured, its security resting on an invalid assignment.

2. Whether the District Court correctly determined that even if *arguendo* Blake's assignment were valid, it is barred by the statute of limitations.

This case was previously before the Court as

*Markowitz Bros. v. Fox-Greenwald Sheet Metal Co., Inc.*, Appeal No. 20900. The Court filed a written opinion on June 25, 1968, at 399 F. 2d 588.

#### REFERENCE TO RULINGS

The memorandum opinion below was filed on February 28, 1969, by Judge Joseph P. McGarraghy, United States District Judge for the District of Columbia. The Court's judgment was entered on April 1, 1969 (JA 68-71).

#### STATEMENT OF THE CASE

This case involves the priority of competing claims to a \$114,232.49 judgment obtained by the Fox-Greenwald Sheet Metal Company, Inc. (taxpayer herein) and paid into the Registry of this Court. (JA 5, 8, 9.)<sup>1</sup> The United States claims a prior interest in the fund pursuant to tax liens in the amount of \$112,189.45 outstanding against taxpayer covering tax liabilities for the years 1963 and 1964. (JA 26, 84.) Notices of these liens were duly filed on February 17, 1964, April 27, 1964, and May 8, 1964, with the Clerk of the Court for Prince Georges County, Maryland, where taxpayer maintained its principal place of business. (JA 26-27, 84.) Blake Construction Company (sometimes hereinafter "Blake"), another creditor of the taxpayer, contends that an assignment to it from taxpayer in August, 1963, allegedly securing a \$50,000 indebtedness, primes the Government's claim. (JA 18-20.) The District Court, after hearing and submission of trial memoranda on the issue, determined that the tax

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<sup>1</sup> "JA" references are to the joint Appendix.

liens of the United States were superior to Blake's claim (JA 68-71), and entered judgment for the United States on April 1, 1969 (JA 72). Blake filed a timely notice of appeal on April 8, 1969. (JA 73.) Jurisdiction is conferred on this Court under 28 U.S.C., Section 1291.

Blake Construction Company is a general contractor and was the prime contractor employed by the General Services Administration for the construction of the National Bureau of Standards Building in Gaithersburg, Maryland, in the early 1960's. Blake employed Markowitz Brothers, Inc. (sometimes hereinafter "Markowitz") as its mechanical subcontractor for the project, and Markowitz subcontracted the sheet metal work for the air conditioning plant to the taxpayer, Fox-Greenwald Sheet Metal Co., Inc. (JA 17.)

In August, 1963, because of difficulties it was having in meeting its payroll, taxpayer negotiated a \$50,000 loan from Blake to be advanced in two installments. (JA 68.) On August 15, Blake delivered a check for \$20,000 to taxpayer; on August 27, it transferred the remaining \$30,000. (JA 79-80.) Taxpayer, on August 27, 1963, signed and delivered to Blake a \$50,000 promissory note due 60 days after date. (JA 76.) This was secured by an assignment of funds to become due to taxpayer on its contract with Markowitz. (JA 74-75.) Taxpayer's contract with Markowitz was for \$1,050,000 and at the time of the loan taxpayer warranted that at least \$200,000 was still owing to it. (JA 74, 75.)



Article 22 of taxpayer's contract with Markowitz provided as follows (JA 68):

Subcontractor [taxpayer] agrees that he will not sublet, or assign, transfer this Contract or any part thereof, or any interest therein, or any moneys due hereunder, without first obtaining the written consent of the Contractor [Markowitz].

Although requested to do so, Markowitz never gave its written consent to taxpayer's assignment of contract funds to Blake, either before or after the assignment was made. (JA 41.)

In February of 1964, Markowitz terminated taxpayer's contract and refused to make further payments on it. (JA 43-44.) Taxpayer filed suit against Markowitz and its surety, Continental Casualty Company (sometimes hereinafter "Continental"), for breach of contract in the United States District Court for the District of Columbia, *Fox-Greenwald Sheet Metal Co., Inc. v. Markowitz Brothers, Inc.*, Civil No. 1238-64. On December 20, 1966, taxpayer received a jury award in the amount of \$103,458.81 plus interest and costs. Markowitz and Continental appealed the judgment to this Court, which entered a *per curiam* affirmance on June 25, 1968. *Markowitz Bros. v. Fox-Greenwald Sheet Metal Co.*, 399 F. 2d 588 (C.A.D.C.). Markowitz and Continental then petitioned and were granted leave to pay the amount of the judgment into the Registry of the Court in order to protect against multiple liabilities by parties claiming competing entitlement to the judgment. (JA 5-8, 9.)

Taxpayer had, in the meantime, defaulted on its \$50,000 indebtedness to Blake which became due in October, 1963. Blake received one interest payment of \$500 from the taxpayer on the loan (JA 43) but had received no other payments. In Civil No. 350-64, in the United States District Court for the District of Columbia, therefore, Blake brought suit against taxpayer on the promissory note taxpayer had given Blake. It did not, however, allege any rights under the August 27 assignment. Neither did it join in taxpayer's breach of contract action against Markowitz. Blake's suit against taxpayer (Civil No. 350-64) is still pending.

Taxpayer also brought a Miller Act suit against Blake, Continental, and Aetna Casualty and Surety Company, Blake's surety, in the United States District Court for the District of Maryland, *United States of America for the Use and Benefit of Fox-Greenwald Sheet Metal Company, Inc. v. Aetna Casualty and Surety Company and Blake Construction Company*, Civil No. 15694. That suit is also still pending.

After taxpayer's default, but before its contract was terminated with Markowitz, Blake made additional contract payments to Markowitz and did not withhold funds therefrom pursuant to taxpayer's assignment to it.

Below, the District Court held that Blake did not have a secured interest under the assignment which would prime the Government's liens for the reason that the assignment was not made with prior written

consent of Markowitz as required. (JA 70-71.) In addition, it determined that the assignment was not timely asserted (it having arisen on October 27, 1963, and Blake's claim herein not having been asserted until August 22, 1968) and therefore was barred by the statute of limitations. (JA 71.) By stipulation of all parties, a \$28,451.17 attorney's lien in favor of Fred C. Sacks, Esquire, attorney for Fox-Greenwald, was held superior to all other claims and was ordered paid out of the fund, with \$427.80 for advanced costs, on January 6, 1969. (JA 29.) The remaining portion of the fund, \$85,353.52, was ordered to be paid to the United States. (JA 72.) The Court's judgment was entered on April 1, 1969 (JA 72), and Blake filed its notice of appeal on April 8, 1969 (JA 73).

#### SUMMARY OF ARGUMENT

This case involves a contest between competing claims of the United States and Blake Construction Company to a judgment won by Fox-Greenwald Sheet Metal Company, Inc., taxpayer herein. The Government's claim rests on tax liens filed in February, April and May, 1964. Blake claims a superior interest to taxpayer's judgment by reason of taxpayer's default on a \$50,000 loan made on August 27, 1963 and due sixty days thereafter. Under Section 6323, Internal Revenue Code of 1954, in order to prime the Government's claim, Blake must show that it had a valid security interest. Blake's security for its indebtedness, however, rests on an invalid assignment of funds from taxpayer on its construction contract

with Markowitz Brothers. Since the assignment is legally insufficient, Blake is relegated to the status of a general creditor and is subordinate to the Government's claim.

Blake was the general contractor on the National Bureau of Standards project in Gaithersburg, Maryland. Markowitz was its mechanical subcontractor, and taxpayer was a sub-subcontractor. Taxpayer's contract with Markowitz provided that any assignment of contract funds, to be valid, must have Markowitz' prior written consent. Such contractual limitations on assignment of contract rights were permissible under Maryland law (at the time the contract was entered into), which controls here. Markowitz, although requested to, never gave its written consent to taxpayer's assignment to Blake, either before or after the assignment was made. Accordingly, the assignment is invalid. Although taxpayer itself may be estopped to deny the validity of its assignment to Blake, no such estoppel runs against third party creditors of the taxpayer, such as the United States.

Moreover, Blake's assignment, even if valid, is barred by the statute of limitations. Blake's assignment arose on August 27, 1963, and was enforceable at the time of taxpayer's default, on October 27, 1963. Blake did not assert its claim under the assignment, however, until August 22, 1968, almost five years later. Since the statute of limitations on this type of contract is three years, the action is now barred. The fact that Blake brought suit against taxpayer in 1964 on its promissory note evidencing the underlying debt is

not controlling. Blake's action on the assignment was a separate cause of action, to be asserted against Markowitz. Its suit against taxpayer on the note did not toll the statute with respect to its rights under the assignment.

#### ARGUMENT

The District Court correctly determined that the Government's tax liens against taxpayer primed a \$50,000 claim asserted by Blake Construction Company for the reasons that (1) Blake's claim was unsecured, its security resting on an invalid assignment, and (2) even if valid, Blake's assignment was barred by the statute of limitations

#### A. Introduction

Section 6321 of the Internal Revenue Code of 1954, Appendix, *infra*, provides that a lien shall attach in favor of the United States on all property and rights to property of any person who neglects or refuses, after demand, to pay any taxes for which he is liable. Section 6322, Appendix, *infra*, provides that the lien imposed by Section 6321 shall arise at the time the assessment against the taxpayer is made. Section 6323, Appendix, *infra*, enumerates certain classes of creditors whose claims will be superior to the federal tax lien until notice thereof is filed. These include, *inter alia*, holders of security interests. Where the United States asserts a tax lien against a taxpayer, therefore, in order to prime the Government's claim, a claimant must show that he falls within one of the protected groups enumerated in Section 6323. Otherwise, the tax lien will be superior to his claim.

In the instant case, the United States asserted tax liens against the taxpayer and filed notices of liens on

February 17, 1964, April 27, 1964, and May 8, 1964. (JA 26-27.) Blake Construction Company asserted a prior claim deriving from a \$50,000 promissory note it received from taxpayer on August 27, 1963, allegedly secured by an assignment of funds on taxpayer's construction contract with Markowitz Brothers. On the basis of the assignment, Blake claimed priority status as a secured creditor within the purview of Section 6323. (JA 18-20.) The court below held that Blake's assignment was invalid for the reason that it was not consented to by Markowitz, as required in taxpayer's contract for any assignment of funds. It held also that even if valid, Blake failed to assert its assignment within the three year statutory period and it was therefore barred by the statute of limitations. Accordingly, it determined that the United States' tax liens primed Blake's claim. (JA 70-71.) The decision of the District Court is correct and should be affirmed.

***B. Taxpayer's assignment of contract funds to Blake is invalid for failure to obtain prior written consent to the assignment from Markowitz Brothers as required in its contract***

Under the law of Maryland<sup>2</sup> at the time the contract was entered into,<sup>3</sup> it is clear that parties could

<sup>2</sup> The assignment of funds from taxpayer to Blake was signed and fully performable in Maryland. Under District of Columbia conflict of law principles, Maryland law controls with respect to substantive questions covering the validity and enforceability of the assignment. *Gagnon v. Wright*, 200 A. 2d 196 (D.C. Ct. App.).

<sup>3</sup> The Uniform Commercial Code was not enacted into Maryland law until February 1, 1964, and was specifically made prospective only. 8B Annotated Code of Maryland, Art. 95B, §§ 10-101, 10-102.

contract to limit the assignability of the rights and duties of contracts they entered into. *Michaelson v. Sokolove*, 169 Md. 529, 182 Atl. 458; *Andrew v. Meyerdirck*, 87 Md. 511, 40 Atl. 173; *Bimestefer v. Bimestefer*, 205 Md. 541, 109 A. 2d 768; cf. *Wolbert v. Bief*, 194 Md. 642, 650, 71 A. 2d 761, 764. Nothing in the Annotated Code of Maryland, 195, Article 8, Section 1, Appendix, *infra*, is to the contrary.

In accordance with Maryland law at the time, taxpayer, in its contract with Markowitz Brothers, Inc., contracted as follows (JA 68):

ARTICLE 22. Subcontractor [taxpayer] agrees that he will not sublet, or assign, transfer this Contract or any part thereof, or any interest therein, or any moneys due hereunder without first obtaining the written consent of the Contractor [Markowitz].

The clear import of this provision was that Markowitz not only was to have notice of any assignment made by taxpayer of its contract rights but, in addition, Markowitz had to consent to such assignment. Otherwise, the provision would simply have read that written notice must be furnished to Markowitz, not consented to in writing by it.

On August 27, 1963, taxpayer executed a written assignment of contract funds to become due on its contract with Markowitz in favor of Blake. (JA 74-75.) Blake never obtained the necessary prior written consent to the assignment of the subcontract funds, either before or after August 27, 1963. (JA 41.) Accordingly, the assignment is invalid under Maryland law.



That Blake knew of the contract provision requiring prior written consent of Markowitz is evidenced by its numerous efforts, both before and after the assignment was made on August 27, 1963, to obtain Markowitz' written consent. Thus, Stanley Bender, Blake's treasurer, testified that he had talked to Ben Markowitz, president of Markowitz Brothers, Inc., on the telephone and had asked for the written consent before the loan was made. (JA 52, 57, 58, 59.) He testified further that he tried for a period of two months thereafter to obtain the written approval. (JA 60.) Taxpayer wrote a letter to Markowitz dated August 28, 1963, seeking Markowitz' approval of the assignment. (JA 83.) And Blake also wrote to Markowitz on November 1, 1963, stating, "We also request, at this time, the approval of the assignment made by Fox-Greenwald Company, as this has been dragging on for the past two months." (JA 82.) All efforts to obtain Markowitz' written consent to the assignment were, however, unsuccessful.

Furthermore, Blake has, by its subsequent actions, acknowledged that it knew the assignment was invalid. Thus, in its suit against the taxpayer, filed in the United States District Court for the District of Columbia, Civil No. 350-64, Blake alleged solely the promissory note and made no mention whatever of the security protecting its interest. And in taxpayer's suit against Markowitz in the District Court (affirmed on appeal by this Court), Blake failed to join with taxpayer as a party plaintiff. Additionally, in its dealings with Markowitz before Markowitz terminated tax-

payer's contract, Blake failed to withhold payments to Markowitz that were to be paid to taxpayer for work performed. If the assignment had been valid, this would have been a proper procedure for it to follow, since taxpayer was obligated to pay the funds back to it immediately. Blake's failure to withhold contract funds from Markowitz was explained by Stanley Bender in pre-trial interrogatories:

Blake could not contractually withhold payments from Markowitz because of moneys owed it by Fox-Greenwald, unless and until Markowitz accepted the assignment from Fox-Greenwald.

We submit that this statement constitutes a clear admission that Blake understood that the assignment was not a perfected security interest protecting its \$50,000 loan to taxpayer.

Blake concedes on brief (Br. 7) that the assignment was not binding as against Markowitz, but argues that it "must be binding upon all persons or parties *other than Markowitz*." It would be difficult to find case support for this novel theory, and, indeed Blake cites none. In essence, this argument asserts that an invalid assignment is valid against all except the obligor.

We submit that this statement of law is in error and that if the assignment is invalid, it is invalid for all purposes, not just as against the obligor. An exception may lie in a suit by the assignee against the assignor (*Dole Co. v. Aetna Casualty and Surety Co.*, 269 F. Supp. 72 (D.C. Me.); *Ruberoid Co. v. Glass-*

man, 248 Md. 97, 234 A. 2d 875) for the reason that there arises an estoppel against the one who made the assignment to deny its validity. But that is the only party who is estopped to deny the assignment's validity. There appears to be no authority for the proposition that an estoppel runs against bona fide creditors of the assignor, such as the United States in this case, whether or not they have knowledge of the assignment.

If, as Blake's actions indicate, and as we contend, the assignment to Blake is invalid vis-a-vis the United States, then it can derive no new vitality from the fact that taxpayer won a judgment of the funds it agreed to pay to Blake. This fact, as stated above, might have some significance as between Blake and the taxpayer (*Dole Co. v. Aetna Casualty and Surety Co.*, *supra*; *Ruberoid Co. v. Glassman*, *supra*), but it cannot operate to validate an otherwise invalid assignment as against the rights of the United States, or retroactively to secure Blake's claim. The weakness in the assignment by reason of the parties' failure to obtain prior written approval of it from Markowitz as required must render it invalid against all parties other than the taxpayer itself, and the judgment of the contract funds does not change this fact.

Taxpayer has cited *Portuguese-American Bank v. Welles*, 242 U.S. 7, in support of its position here. (Br. 6-7.) But that case rests on the broad proposition that assignments of property interests cannot be limited, analogizing them to chattels. That decision has been criticized (Comment, 26 Yale L.J. 304 (1917); 4

Corbin on Contracts, Section 873), and we respectfully submit that the rule enunciated in that case is not the present law. See, e.g., *Martin v. National Surety Co.*, 300 U.S. 588; *United States v. Janowitz*, 257 U.S. 42; *Bitterman v. Louisville & Nashville R.R.*, 207 U.S. 205; *Michaelson v. Sokolove*, *supra*; 4 Corbin on Contracts, Section 873; 3 Williston on Contracts, Section 422.

Because Blake failed to show that it had a valid security interest prior in time to the Government's notices of liens against taxpayer, the District Court correctly determined that the tax liens of the United States primed Blake's claim and were entitled to be satisfied before Blake out of the taxpayer's judgment fund.

**C. Blake's assignment, even if valid, is barred by the statute of limitations**

The assignment under which Blake claims an interest in the fund was given on August 27, 1963, and became enforceable sixty days later. (JA 75-75.) On October 27, 1963, when the underlying debt matured, taxpayer defaulted on the loan, and Blake's rights under the assignment arose. Blake filed its claim herein on August 22, 1968, almost five years later. (JA 17.)

The statute of limitations in the District of Columbia on simple contracts and all interests not otherwise specified is three years. D.C. Code, Section 12-301(7), (8). Blake's claim herein was not timely filed, and it is barred by the running of the statute.

Blake argues, first, that its right to the assigned fund did not "ripen into action" (Br. 8) until after

taxpayer won its judgment against Markowitz, and that presumably the statute should begin to run from that time. This theory appears to be in conflict with its alternative position, that the statute was tolled by institution of the suit on the promissory note against taxpayer in 1964. In addition, it appears to be in conflict with established security principles. It is clear that a security interest, capable of enforcement, may arise on contract rights to property not yet in existence. See 4 Corbin on Contracts, Sec. 874. If the assignee then defaults on the underlying obligation, the assignor's remedy is to sue on the assignment and have himself subrogated to the assignee's right to receive the contract property, or simply sue the obligor in his own name, as assignee. This right of action accrues at the time of the assignor's default on the underlying obligation. We are unaware of authority for the proposition (and <sup>Blake</sup> taxpayer has cited none) that the assignee has no right of action until the property actually comes into existence or that the statute does not begin to run until that time. Accordingly, Blake's argument that the statute did not begin to run until taxpayer obtained a judgment against Markowitz appears to be without merit.

Blake also argues (Br. 8) that the statute was tolled by its filing of Civil No. 350-64 against the taxpayer, which alleged the \$50,000 indebtedness on the basis of the promissory note which taxpayer delivered to Blake. This action, however, constituted only one of several independent causes of action available to Blake at the time of default. Since the others,

including suit on the assignment, were not initiated within the statutory period, they are now waived.

Blake, at the time of default, had available to it a number of legal remedies. First, it could have sued taxpayer on the promissory note (which it did, in Civil No. 350-64). Second, it could have sued taxpayer to become subrogated to its contract rights under the assignment (which it did not). In addition, it could have sued Markowitz in its own name as the obligor of taxpayer's assignment to it (which it did not). Art. 1 § 8; *Michaelson v. Sokolove*, *supra*. Alternatively, it could have joined in taxpayer's suit against Markowitz as a party plaintiff (which it did not). The fact that Blake undertook one of these remedies (the suit against taxpayer) does not toll the statute on the other causes of action. See *Condol v. Baltimore & Ohio R.R.*, 91 U.S. App. D.C. 255, 199 F. 2d 400; *Wharton v. Jones*, 285 F. Supp. 634 (D.C.); *Nunnally v. Wilder*, 117 U.S. App. D.C. 377, 330 F. 2d 843; *King v. Udall*, 266 F. Supp. 747 (D.C.). Thus Blake's failure to act on its assignment of funds from taxpayer within the statutory period renders that action now unenforceable.

## CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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OCTOBER, 1969.

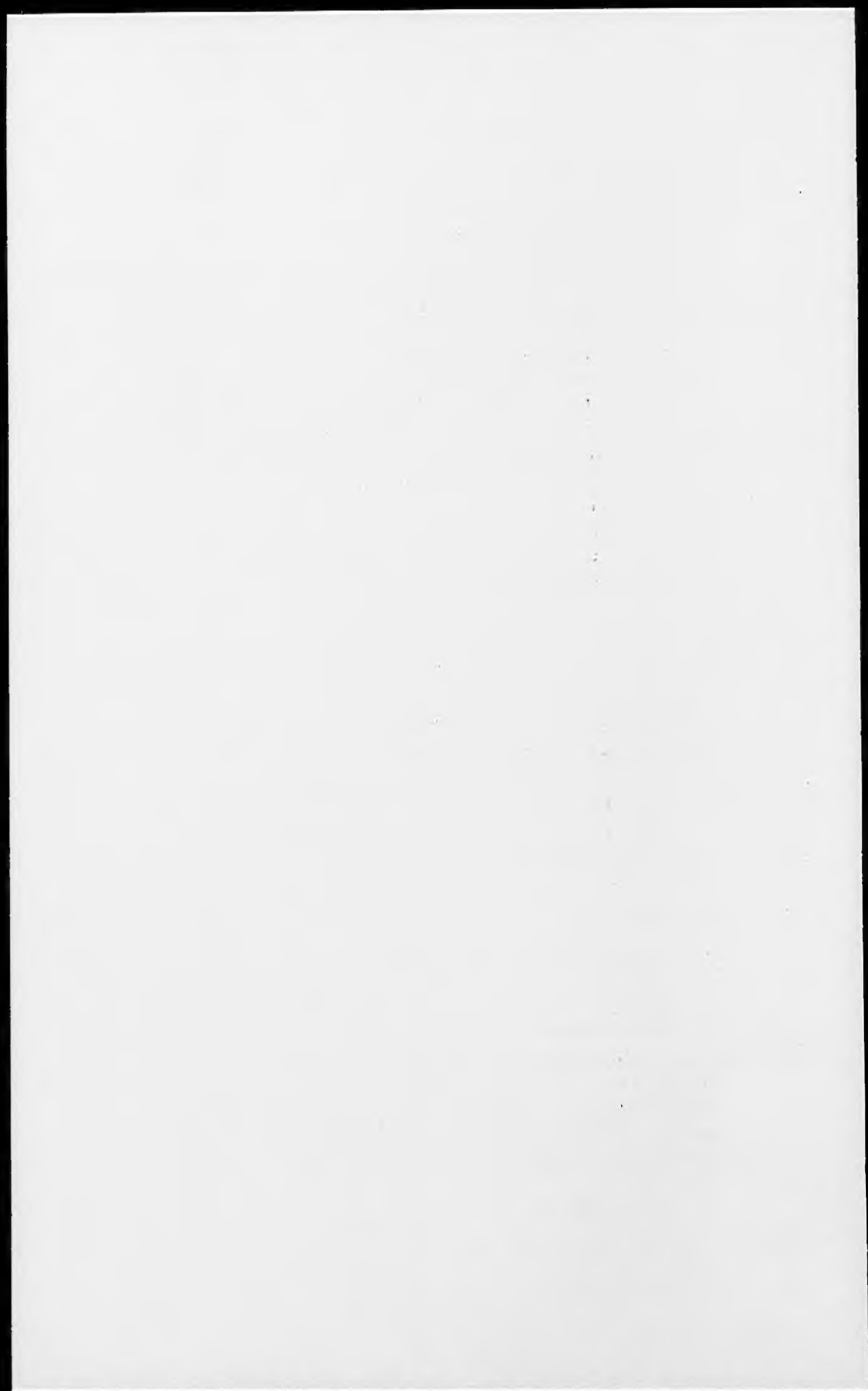
## CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing two copies thereof to each on this ----- day of October, 1969, in an envelope, with postage prepaid, properly addressed to them as follows:

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## APPENDIX

### Internal Revenue Code of 1954:

#### SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, additional to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1964 ed., Sec. 6321.)

#### SEC. 6322 [as amended by Sec. 113(a), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125]. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1964 ed., Sec. 6322.)

#### SEC. 6323 [as amended by Sec. 101(a), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125]. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

(a) *Purchases [purchasers], Holders of Security Interests, Mechanic's Lienors, and Judgment Lien Creditors.*—The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, me-

chanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate.

\* \* \* \* \*

(h) *Definitions.*—For purposes of this section and section 6324—

(1) *Security interest.*—The term “security interest” means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

\* \* \* \* \*

(26 U.S.C. 1964 ed., Sec. 6323.)

Annotated Code of Maryland, 1951:

ARTICLE 8.

1. The assignee of any judgment, bond, specialty, or other chose in action for the payment of money, or any legacy or distributive share of the estate of a deceased person *bona fide* entitled thereto by assignment in writing signed by the person authorized to make the same, may, by virtue of such assignment, maintain an action or issue an execution in his own name against the debtor therein named, in the same manner as the assignor might have done before the assignment.

